128-510

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 943.

THE TRUSTEES OF DUBLIN TOWNSHIP, MERCER COUNTY, OHIO, PLAINTIFF IN ERROR,

vs.

THE MILFORD FIVE CENT SAVINGS INSTITUTION.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

FILED JANUARY 18, 1888.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, AUGUST 27, 1888.

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a The United States of America to the Milford Five-Cent Savings Institution, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of Ohio, western division, wherein The Trustees of Dublin Township, in Mercer County, State of Ohio, are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Martin Welker, one of the judges of the circuit court for said district, this sixth day of January, in the year of our Lord one thousand eight hundred and eighty-eight.

M. WELKER,
Dist. Judge U. S., N. D. O.

b On this 9th day of January, in the year of our Lord one thousand eight hundred and eighty-eight, personally appeared W. Breed before me, the subscriber, a United States commissioner for the northern district of Ohio, and makes oath that he delivered a true copy of the within citation to John C. Lee, one of the attorneys of record of the within-named The Milford Five-Cent Savings Institution, on the 6th day of January, 1888, at Toledo, Ohio.

W. BREED.

Sworn to and subscribed the ninth day of January, A. D. 1888.

HALLIE W. BROWN,
U. S. Commissioner, N. D. O.

Fees:

Service	2 00
Copy	50
	2 50

c In obedience to the command of the writ of error hereto attached I have diligently searched the records of our circuit court and now herewith return with said writ of error a full and complete transcript of the record of the proceedings had in said court in the cause therein entitled.

Witness my official signature and seal of office at Toledo, Ohio, in said district, on the 6th day of January, 1888.

[Seal of the Circuit Court, Northern Dist. of Ohio.]

AUGUSTUS J. RICKS, *Clerk.*

d UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the northern district of Ohio, western division, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between The Milford Five-Cent Savings Institution, plaintiff, and The Trustees of Dublin Township, in Mercer County, Ohio, and Cornelius Smith, Henry Van Tilburg, Peter Frysinger, Allen G. Wiley, and John L. Lameraux, defendants, a manifest error hath happened, to the great damage of the said The Trustees of Dublin Township, in Mercer County, State of Ohio, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the sixth day of January, in the year of our Lord one thousand eight hundred and eighty-eight.

[Seal of the Circuit Court, Northern Dist. of Ohio.]

AUGUSTUS J. RICKS,
Clerk of the Circuit Court of the United States, Northern District of Ohio.

Allowed by—
—— ——.

1 *Certificate of Division of Opinion.*

The Circuit Court of the United States for the Northern District of Ohio, Western Division.

THE MILFORD FIVE-CENT SAVINGS INSTITUTION
vs.
DUBLIN TOWNSHIP.

This was an action at law, wherein the plaintiff filed his petition as follows:

Amended Petition.

In the Circuit Court of the United States for the Northern District of Ohio, Western Division.

THE MILFORD FIVE-CENT SAVINGS INSTITUTION, a Body Corporate, Plaintiff,

vs.

THE TRUSTEES OF DUBLIN TOWNSHIP, in Mercer County, State of Ohio, and Cornelius Smith, Henry Van Tilburg, Peter Frysinger, Allen G. Wiley, and John L. Lameraux, Defendants.

First cause of action.

Paragraph I. The plaintiff, by leave of the court, now comes and, by way of amendment of and in lieu of its original petition herein, says—

That it is a corporation created by and existing under the laws of the State of New Hampshire, and is a citizen of said
2 State, and that the defendant is a civil, political, and municipal corporation created by and existing as a township in said county of Mercer under the laws of Ohio, and is a citizen of the said State of Ohio.

That on the 10th day of April, A. D. 1880, the Legislature of Ohio passed an act, and the same took effect on the passage thereof, wherein and whereby, amongst other things, it was provided that whenever in any township which by the Federal census of 1870 had, and which by any subsequent Federal census might have, a population of 1,599 the township trustees thereof should, on the petition of not less than 50 resident tax-payers of said township, pass a resolution declaring it to be essential to the interests of said township that a line of railway should be constructed on a line to be designated in said petition, and said railway should be named in said resolution, and the terminal thereof should be designated therein, and not to exceed seven miles in length, it should be lawful for a board of trustees, appointed as therein provided, and they were thereby authorized, to borrow as a fund for that purpose not to exceed the sum of twenty thousand dollars, and to issue bonds therefor in the name of said township, bearing interest at a rate not to exceed six per cent. per annum, payable semi-annually.

Also that said bonds should be payable at such times and places and in such sums as should be deemed best by said board; also that said bonds should be signed and sealed by the president of said board and attested by the clerk of said township, who should keep a register of the same, and they should be secured by the pledge of the faith of said township, and a tax, which it should be
3 the duty of the trustees thereof annually to levy (which tax should not exceed three mills on the dollar in any one year) to pay the interest and provide a sinking fund for the final redemption of said bonds, and annexed is a proviso to the foregoing that

no money should be borrowed on bonds issued until after the question of providing the line of railroad specified in said resolution should be submitted to a vote of the qualified electors of said township at a special election to be ordered by the township trustees thereof, of which not less than twenty days' notice should be given, by posting up notices at not less than five of the most public places in said township and by publishing for three successive weeks said notices in a newspaper printed in the county wherein said township should be located and of general circulation in said township, and also a further proviso that a majority of said electors voting at said election should decide in favor of said line of railway.

It was also further provided in and by said act that the returns of said election should be made to the clerk of said township and by him be laid before the township trustees, who should declare the result by resolution, and that the bonds issued under authority of said act should not be sold or disposed of for less than their par value.

And wherein and whereby it was also further provided that if a majority of the votes cast at said election should be in favor of the construction of the line of railway as hereinbefore specified it should be the duty of the township trustees to nominate five trustees, who should be electors and freeholders in said township, to be called the trustees of —— railway (the blank to be filled with the name
4 of the railroad as given in the aforesaid resolution), and that the said nominations should be forthwith presented to the judge of the court of common pleas presiding in said county for his approval or rejection; and, in case of his rejecting any of the persons named, three other nominations should be made in like manner until said board should be filled, and when the said board should be full the said judge should make an order entering said appointment on the minutes of the court of which he should be a judge, and that he should also determine the amount of the bond to be given by the trustees, which bond should be several and conditioned for the faithful performance of their duties as said trustees.

That said bond should be signed by not less than three sureties and be approved by the clerk of said court and should be signed in duplicates, and a copy be filed with the clerk of said court and the other with the treasurer of said township; and that said trustees should, before entering upon the discharge of their duties, each take an oath of office that they would faithfully and honestly discharge the duties of their office.

Also that in and by said act it was further provided that said board of trustees and their successors should be the trustees of said fund and should have the control and disbursement of the same, and that they should extend said fund in procuring the right to construct and in constructing a railway, with all the appendages, and, if deemed necessary, a line of telegraph between the termini specified in said resolution, and that for the purpose aforesaid they should have the power and authority to make contracts, appoint, employ, and pay officers and agents, and to acquire, hold, and possess all the necessary real and personal property and fran-
5 chises; and that they should also have power to receive do-

nations of land, money, bonds, and other personal property, and to dispose of the same in aid of said fund.

And also that said trustees should have the right to bring, maintain, and defend all actions, and to sue and be sued, plead and be impleaded, touching the said trust and trust property, in their own names as said trustees, in any of the courts of the State of Ohio or elsewhere; that they should elect a treasurer, whose duty it should be to draw from the treasurer of the county all of the trust funds upon the order of the said trustees.

And that said treasurer should give bond in such sum as said trustees should designate, which bond should be signed by at least three sureties and approved by at least a majority of said trustees.

And wherein and whereby it was also further provided that said trustees should form a board and choose one of their number president, who should also be the acting trustee, with such power as the board might by resolution from time to time confer upon him.

That the majority of said trustees should constitute a quorum, and should hold regular meetings for the transaction of business at their regular office in the township under whose action they were appointed, but they might adjourn from time to time to meet at any place they might think proper.

That they should keep a record of their proceedings, and cause to be kept a full and accurate account of their disbursements, and make a report of the same to the township clerk whenever requested so to do by a resolution of the township trustees; that no money should be drawn from said fund but upon the order of said
6 board, except their own compensation, which should be paid out of the same, upon the recom-endation of the township trustees, by a resolution duly adopted and allowed by the court appointing; that said act is found in volume 77, and on pages thereof 165, 166, 167, and 168, of Ohio Laws.

The plaintiff further avers that said act was introduced into and passed by said General Assembly of Ohio on the petition of a large number of tax-payers and electors of said Dublin township.

That immediately after the passage of said acts the electors of said township, which was such a township as said act describes, in strict compliance with the provisions of the same, did avail themselves of the provisions of said act, and by them such steps and proceedings were had and taken in said township as are required by the terms of said act as aforesaid, and for the purposes therein specified a board of five trustees was duly appointed by the trustees of said township and the same nominated to the judge of the court of common pleas presiding in said county for his approval or rejection, and the same were approved by said judge, the amount of their bonds prescribed, sureties thereon duly approved, said bonds executed in duplicate and deposited as required by said act, and said board of trustees each took an "oath of office," also as required by said law, and at once entered upon the full discharge of their duties, and said board yet remains a full, legal board for the purposes in said act provided.

The plaintiff further alleges that, according to the provisions of

said act and after due and legal notice thereof, a vote was taken by the electors of said township, and at said election a majority
7 of the votes cast by said electors were in favor of the construction of a line of railway across said township, and such further steps and proceedings were then had as are required by said act and for the purposes contemplated in the construction of a line of railway for said township, and said board of trustees caused to be prepared and issued $12,000 in 10 bonds of said township, numbered consecutively from 1 to 10, inclusive, in the sum of one thousand dollars each, and four bonds of $500 each, No. from 27 to 30, inclusive, $500 each, payable on the 15th day of July, A. D. 1900, to bearer, at First Nat'l Bank of New York City, with interest at the rate of six per cent. per annum, payable semi-annually on the 1st day- of January and July each year, at said rate, on the surrender of the proper interest coupon attached to each bond.

That there were attached to and forming a part of each of said bonds ten (10) interest coupons, numbered from one to ten, inclusive, in the sum of 30 dollars each, payable to bearer on the first day- of January and July in each year after the issuance of the same, and also bonds owned by plaintiff, from 27 to 30, inclusive, for $500 each, with six per cent. interest, bearing coupons, payable as above as to time and place, $15 per coupon.

That each of said bonds and coupons were executed and attested in all respects as required by said act; that immediately after the execution of said bonds they with their coupons were sold for not less than their par value and were in good faith purchased and received by plaintiff, for which it paid the full par value of the same and upwards, to wit, the sum of twelve thousand four hundred dollars ($-2,400), which sum was received by said board of trus-
8 tees for the purpose of constructing said railway in said Dublin township, and the same said fund of twelve thousand four hundred dollars ($12,400) was thereafter in all respects and in conformity to said act used by said board of trustees in procuring right of way for and in constructing said line of railway in said Dublin township, whereby said township became and yet is the owner and holder of said line of railway, which became, was, and is of great value to the said township, to wit, in a sum exceeding said sum of twelve thousand dollars ($12,000).

Said plaintiff further alleges that at the time it so advanced and lent said twelve thousand dollars ($12,000) and therefore received said bonds with their coupons attached, it acted in all respects in good faith, fully believing that said township and said board of trustees had full power to borrow said sum of twelve thousand dollars ($12,000) and to execute and deliver therefor said bonds with their coupons, and that the property of said township stood pledged to the repayment of said money and the payment of the principal and interest of said bonds according to their terms.

The plaintiff became the owner of said bonds and coupons before maturity, in good faith, for valuable consideration, and plaintiff here avers that said act under which the construction of said railway was authorized, said money borrowed, and said bonds and coupons exe-

cuted and delivered was and is in substance and its full effect in harmony and not in conflict with the constitution of the State of Ohio, as had been theretofore determined by the court of last resort in the said State of Ohio, to wit, the supreme court of said State, and as declared by said last-named court in the cause entitled Walker against Cincinnati, and duly reported in the 21st 9–74 vol. of the Ohio State Reports, beginning on page 14th, paragraph II (of 1st cause of action).

And plaintiff further says that it now is the owner and holder of the coupon or interest warrant No. 4 for the installment of interest maturing upon said bond No. 1, above mentioned, on the 1st day of July, A. D, 1882, whereby the defendant undertook and promised to pay unto the bearer thereof, on the first day of July, A. D. 1882, the sum of thirty dollars ($30) at said bank, and copy of which is attached hereto, marked "Exhibit A," and, notwithstanding the said promise so to do, the defendant has neglected and refused to pay the same, although requested at the maturity thereof; wherefore an action has accrued to the plaintiff to recover the sum of thirty dollars ($30), with interest at the rate of 6 per cent. per annum from the first day of July, A. D. 1882, from the defendant, for which sum, with interest from said date, plaintiff prays judgment.

EXHIBIT "A."

$30. Interest warrant No. 4.

On the first day of July, A. D. 1882, Dublin township, Mercer county, State of Ohio, will pay the bearer the sum of thirty dollars at the First National Bank in New York city, being six months' interest on bond No. 1, dated June 1st, 1880.

JOHN W. MILLER,
Township Clerk.

(The second to the 126th causes of action, inclusive, omitted in printing, per stipulation. See p. 126.)

75 127*th Cause of Action.*

The plaintiff, The Milford Five-Cents Savings Institution, which is a body corporate under the laws of New Hampshire, avers that it is a resident and citizen of the State of New Hampshire and a non-resident of the State of Ohio, and that the defendants, The Trustees of Dublin Township, in Mercer County, Ohio, is a body corporate under the laws of Ohio. and that said The Trustees of Dublin Township aforesaid and their co-defendants, Cornelius Smith, Henry Van Tilburg, Peter Frysinger, Allen G. Wiley, and John L. Lameraux, are each and all residents and citizens of Mercer county, in the State of Ohio.

The aforesaid plaintiff, not waiving its first cause of action but praying in the alternative on that cause of action, further alleges that on the 10th day of April, A. D. 1880, the General Assembly of

the State of Ohio passed an act entitled "An act to authorize certain townships to build railroads and to lease and operate the same," which act is found in vol. 77 of Ohio Laws, commencing on page 165, and the first four sections of which are as follows:

(*Senate Bill No.* 187.)

An act to authorize certain townships to build railroads and to lease or operate the same (Dublin township, Mercer county).

SECTION 1. Be it enacted by the General Assembly of the State of Ohio, That whenever in any township which by the Federal census of 1870 had, and which by any subsequent Federal census may have, a population of one thousand five hundred and ninety-nine the township trustees thereof shall, on the petition of fifty resident tax-payers of such township, pass a resolution declaring it to be essential
76 to the interests of such township that a line of railway should be constructed on the line to be designated in said petition, and said railway shall be named in said resolution and the termini thereof shall be designated therein, and not to exceed seven miles in length, it shall be lawful for a board of trustees appointed as herein provided, and they are hereby authorized, to borrow as a fund for that purpose not to exceed the sum of twenty thousand dollars, and to issue bonds therefor in the name of said township, bearing interest at the rate not exceeding six per centum, payable semi-annually, said bonds to be payable at such times and places and in such sums as shall be deemed best by said board. Said bonds shall be signed and sealed by the president of said board and attested by the clerk of such township, who shall keep a register of the same, and they shall be secured by the pledge of the faith of such township, and a tax, which it shall be the duty of the trustees thereof annually to levy (which tax shall not exceed three mills on the dollar in any one year) to pay the interest and provide a sinking fund for the final redemption of said bonds; and provided that no money shall be borrowed on bonds issued until after the question of providing the line of railway specified in said resolution shall be submitted to a vote of the qualified electors of such township at a special election to be ordered by the township trustees thereof, of which not less than twenty days' notice shall be given by posting up notices at not less than five of the most public places in each of the villages of such township and by publishing for three successive weeks such notice in a newspaper printed in the county wherein such township is located and of general circulation in such township; further provided, a majority of said electors voting at such election shall
77 decide in favor of said line of railway. The returns of said election shall be made to the clerk of said township and by him laid before the township trustees, who shall declare the result by resolution. The bonds issued under the authority of this section shall not be sold or disposed of for less than their par value.

SEC. 2. If a majority of the votes cast at said election shall be in favor of the construction of the line of railway as specified in the first section it shall be the duty of the township trustees to nominate

five trustees, who shall be electors and freeholders of said township, to be called the trustees of —— railway (the blank to be filled with the name of the railway designated in said resolution), and the said nominations shall be forthwith presented to the judge of the court of common pleas in said county for his approval or rejection, and in case of his rejecting any of the persons named, then other nominations shall be made in like manner until said board is filled; and when said board shall be filled said judge shall order an entry to be made thereof on the minutes of said court of the approval thereof. He shall also designate the amount of bond to be given by the said trustees, each bond to be several and to be conditioned for the faithful performance of their duties as such trustees, which said bond shall be signed by not less than three sureties and be approved by the clerk of said court, and shall be signed in duplicate, one copy to be filed with the clerk of said court and the other with the treasurer of said township, and before entering upon the discharge of their duties they shall each take an oath of office that they will faithfully and honestly discharge their duties as such trustees.

SEC. 3. The said board of trustees and their successors shall
78 be the trustees of said fund, and shall have the control and disbursement of the same. They shall expend said fund in procuring the right to construct and in constructing a railway, with all the proper appendages, and, if deemed necessary, a line of telegraph between the termini specified in said resolution, and for the purpose aforesaid shall have the power and capacity to make contracts, appoint, employ, and pay officers and agents, and to acquire, hold, and possess all the necessary real and personal property and franchises. They shall also have power to receive donations of land, money, bonds, and other personal property, and to dispose of the same in aid of said fund. The said trustees shall have the right to bring, maintain, and defend all actions, and to sue and be sued, plead and be impleaded, in their own names as such trustees in any of the courts of this State or elsewhere. They shall elect a treasurer, whose duty it shall be to draw from the treasurer of the county all or any of said trust funds upon the order of said trustees, and the said treasurer shall give bond in such sum as the trustees shall designate, which bond shall be signed by at least three securities and be approved by a majority of said trustees.

SEC. 4. The said trustees shall form a board and shall cho-se one of their number president, who shall also be the acting trustee, with such powers as the board may by resolution from time to time confer upon him. A majority of said trustees shall constitute a quorum, and shall hold regular meetings for the transaction of business at their regular office in the township under whose action they are appointed, but they may adjourn from time to time to meet at any place they may think proper. They shall keep a record of their proceedings, and cause to be kept a full and accurate account
79 of their disbursements, and make a report of the same to the township clerk whenever requested to do so by resolution of the township trustees. No money shall be drawn from said fund but upon the order of said board, except their own compensation,

which shall be paid out of the same upon the recom-endation of the township trustees by resolution duly adopted and allowed by the court appointing them.

The plaintiff avers that said act was introduced into and passed by said General Assembly of Ohio on the petition of a large number of the tax-payers and electors of said Dublin township and in the interest and special behalf of said township, as shown by the title of said act, and which said township then had the required population to avail itself of the provisions of said act, and that immediately after the passage of said act the electors of said township did avail themselves of the provisions of said act, and that such steps and proceedings were had and taken by the said defendants as required by the terms of said act and for the purposes therein specified; that said defendants, Cornelius Smith, Henry Van Tilburgh, Peter Frysinger, Allen G. Willy, and John L. Lameraux were by the trustees of said township nominated and appointed as railroad trustees, as required by the second section of said act, and were approved by a judge of the court of common pleas of said Mercer county; and, having duly qualified as required, in the month of ——, 1880, entered upon the duties of their said office of trustees of —— railway for said township and continued to act in that capacity during all the time when the acts and things hereinafter set forth were by them done and for a long time thereafter, and, as plaintiff is informed and believes and avers, they are still holding said positions under said act.

80 The plaintiff further avers that after a vote had been taken by the electors of said township, in pursuance of the provisions of said act, at which election a majority of the votes cast by said electors were in favor of the construction of a line of railway across said township, such further steps and proceedings were then had as required by said act, the said defendants, by their agents, for that purpose and for the purposes contemplated by the provisions of said act, and to construct a line of railway for said Dublin township, borrowed and received from said plaintiff, on the 13th day of July, 1880, the sum of twelve thousand four hundred and twenty dollars ($12,420.00), for the payment of which said defendants issued and caused to be issued the bonds of said Dublin township, executed as required by said act, and thereby pledged the faith of said township for the payment of said sum, with six (6) per cent. interest thereon from July 13th, 1880, and that said bonds were in form and substance negotiable by delivery, and at said date the plaintiff received said bonds before maturity, in good faith, and without notice of any informality, want of power or authority, or other defect or defense thereto, as promises, on the faith and credit of said township, to repay said sum, with said interest, when the same should become due.

The plaintiff alleges that said sum so borrowed at said time then passed into the possession, care, custody, and control of said defendants, and was received of plaintiff by them at said time, and said defendants now and ever since retain and have retained said moneys or their equivalent in value in which the defendants invested the

same, and that with said funds so borrowed of this plaintiff the defendants constructed a line of railway for said township, which
81 it ever since has owned and does now own, and that when said money was borrowed of plaintiff as aforesaid the plaintiff was informed, and in good faith believed, that said act of the General Assembly of Ohio was valid, and said bonds likewise valid and legal; and, further, the plaintiff avers that the defendants, The Trustees of said Dublin Township, made levies in the years 1880, 1881, and 1883 on the taxable property of said township to pay the accruing interest on said bonds and provide a sinking fund for the payment of their principal when due, and that said taxes for said purpose were collected accordingly for two years or more by the treasurer of said county and applied in payment of accruing interest for each of said years; all of which was done up to the year 1882 with the acquiescence and without any protest of the tax-payers of said township; but that thereafter and now said trustees of said township have neglected and refused and now refuse to make any levy to pay either the interest or principal of the sum so borrowed as aforesaid, though urged and requested so to do, and wholly ignore and repudiate said bonds so issued for the payment of said moneys and the terms and conditions of the same, as well as the provisions of said act; and the plaintiff avers that it is unable to enforce the terms of said bonds and the provisions of said act for their payment unless the court finds in its favor on first cause of action; of all which plaintiff was ignorant when said money was borrowed as aforesaid.

The interest accrued and not paid on said bonds amounts to $2,880.00 and more.

The plaintiff now comes and tenders back to said defendants the said bonds, and avers that said defendants are indebted to the plaintiff in said sum of twelve thousand four hundred and twenty dollars ($12,420.00), with six (6) per cent. interest thereon from July
82 13th, 1880, for so much money by said defendants then had and received for the use and benefit of said plaintiff, which said sum was then and is now due and payable from the defendants to the said plaintiff, which defendants refuse to pay or any part thereof.

Wherefore the plaintiff prays judgment against said defendants for said sum of twelve thousand four hundred and twenty dollars ($12,420.00), with six per cent. interest thereon from July 13th, 1880.

JAMES L. PRICE AND
J. C. LEE,
Att'ys for Plaintiff.

THE STATE OF OHIO, }
Van Wert County, } *ss:*

James L. Price, being sworn, says that he is the attorney of record for said plaintiff in the foregoing action; that said plaintiff is a non-resident of said district and of said State, and that the facts alleged in the foregoing petition are true as he verily believes.

JAMES L. PRICE.

Sworn to before me and subscribed in my presence March 15th 1887.

HORACE C. REEVE,
Notary Public, Van Wert Co., Ohio.

And thereupon the defendant filed the following answer:

Exhibit Attached to Answer.

Mercer Common Pleas. June Term, 1881.

JACOB COUNTERMAN *et al.*
vs.
THE TRUSTEES DUBLIN TOWNSHIP.

Proceedings before the Hon. James H. Day, judge of the court of common pleas within and for the county of Mercer and
83 State of Ohio, at a court begun and held in the court-house, in the town of Celina, on the 13th day of June, in the year of our Lord one thousand eight hundred and eighty-one, in a certain cause therein pending, to wit:

Be it therefore remembered that heretofore, to wit, on the 14th day of June, 1881, came the plaintiff and caused to be duly filed in the clerk's office of said court the following petition, to wit:

Petition.

In the Court of Common Pleas of Mercer County, Ohio.

JACOB COUNTERMAN and JACOB S. KEITH, for Themselves and Others, Plaintiffs,

ayainst

THE BOARD OF TRUSTEES OF DUBLIN TOWNSHIP, Mercer County, O.; J. V. Sidenbender, Auditor of Mercer Co., O., and Six Staeger, Treasurer of Mercer County, Ohio, Defendants.

The said plaintiffs, Jacob Counterman and J. S. Keith, now come and for themselves and others, for H. Hardin, T. C. Hardin, Emanuel Grosnide, S. Sutton, Godfrey Hammon, F. Muterspaugh, Elias Deal, W. M. Rutledge, Hiram Clutter, J. Lester, Eli Martz, T. Martz, J. M. Sutton, Sylvester Sutton, W. Custer, S. D. Burns, S. N. Clark, N. Davis, James W. Tullis, M. Adams, R. Kitchens, Levi Dyust, G. W. Pendy, S. F. Pendy, S. F. Hays, John Shinnbuy, Allen Jameson, A. N. Frysinger, L. Bice, L. Williams, A. Kitchens, W. S. Custar, N. C. Harper, J. C. Fast, J. E. Donoran, Joseph W. Dysut, J. N. Robinson, Catharine Robinson, Daniel Huffman, S. A. Dyust, John Muterspaugh, N. E. Webb, John O'Niel, A. V. Gundy, John Putman, James Van Gundy, E. B. Cague, J. F. McKaig, Geo. W. Pedre, Enos Allen, C. C. Stoker, Joseph Drake, M. B. Hays, Sr., —— Palmer, Thomas
84 Palmer, Jr., G. E. Chivington, H. J. Palmer, Samuel Chivington, O. T. Faris, J. W. Harris, G. W. Siler, Joseph Williams,

Thomas McLoughlin, Thomas Palmer, Sr., who have a common interest with the plaintiff- in the subject of the action, say that the said plaintiffs and those for whom they sue are each the owner of property in and tax-payers of Dublin township, Mercer county, Ohio, and are residents of said county.

That the Board of Trustees of said Dublin Township did, on or about the 1st Monday in June, 1880, make a levy of taxes of three mills on the dollar upon the valuation of the taxable property in said Dublin township to pay the interest upon and provide a sinking fund for the payment of certain bonds—twenty thousand dollars ($20,000.00) in amount—issued by virtue of certain proceedings had under a certain pretended act of the General Assembly of Ohio, passed April 10th, 1880, and entitled An act to authorize certain townships to build railroads and to lease and operate the same, published in the Jacob Counterman *et al. vs.* The Trustees of Dublin Township *et al.*, 77th volume of the Laws of Ohio, on pages 165, 166, 167, and 168, and which said pretended act can apply alone to said Dublin township, Mercer county, Ohio.

That the tax so levied was duly certified to the auditor of Mercer county, Ohio, and by him placed upon the tax duplicate and assessed against all the taxable property in said Dublin township, and placed in the hands of the treasurer of said county for collection as other taxes, and that the said treasurerss proceed*ing* to collect the same in violation of the rights of the plaintiffs and for those for whom they sue.

The said plaintiffs further say that on or about the 1st Monday of June, 1881, said Board of Trustees of Dublin Township did, for the like purpose aforesaid, make a levy of taxes of three mills on the dollar of the valuation of all the taxable property in said township, and that the said taxes so levied have been duly certified to the auditor of said county, to be by him placed upon the tax duplicate and assessed against the taxable property in said township, which said auditor is about to proceed to do in violation of the rights of the plaintiffs and those for whom they sue.

The plaintiffs further say that the whole of the tax so levied as aforesaid for the years 1880 and 1881 by the trustees of said Dublin township for the purpose aforesaid are illegal and without any authority of or validity in law.

The plaintiffs further say that J. S. Sidenbender is the auditor and Six Staeger is the treasurer of said county of Mercer. The said plaintiff- further avers that they have no knowledge of nor the means of ascertaining who is the owner and holder of the bonds so issued as under said pretended act as aforesaid. The said plaintiffs for themselves and for those and for whom they sue therefore pray—

That a tempo-ry order of injunction be granted restraining the said treasurer of said county of Mercer from the collection of said taxes as against said plaintiff and those for whom they sue, so levied by the Trustees of Dublin Township as aforesaid; that the auditor of said county of Mercer be restrained from placing on the tax duplicate, so far as it will effect the plaintiffs and those for whom they sue, the taxes levied as aforesaid for the year 1881 by said Board of

Trustees of Dublin Township for the purposes hereinbefore set forth, and that in final hearing of this action that said injunction be made perpetual, and that said Board of Trustees of Dublin Township
86 be forever enjoined from making any levy of taxes as against the plaintiff- and as against those for whom this suit is brought, for the purposes—Jacob Counterman *vs*, The Board of Trustees of Dublin Township *et al.*—hereinbefore set forth, and for such other and further relief as equity may require.

ISAIAH PILLARS,
Att'ys for Pl'ffs.

STATE OF OHIO, } ss:
Mercer County, }

Jacob Counterman, one of said plaintiffs, being duly sworn, says that the statements of the foregoing petition are true.

J. COUNTERMAN.

Sworn to before me and subscribed in my presence this June 13th, 1881.

T. G. TOUVLLLE, *Clerk.*

To clerk of Mercer county — pleas:

Issue summons to sheriff of Mercer county for defendants, returnable according to law. Suit brought to restrain the collection of taxes and other equitable relief. Injunction allowed.

ISAIAH PILLARS,
Att'y for Pl'ff-.

Injunction allowed as prayed for in the petition upon the plaintiffs giving an undertaking to the acceptance of the clerk, in the sum of five hundred dollars, conditioned according to law.

J. J. MOORE,
Judge Court of Common Pleas.

And afterwards, to wit on the 14th day of June, 1881, the following summons was duly issued by the clerk of said court, to wit;

Summons.

THE STATE OF OHIO, } ss:
Mercer County, }

To the sheriff of the county of Mercer:

87 We command you to notify The Board of Trustees of Dublin Township, Mercer County, Ohio; J. V. Sidenbender, auditor of Mercer county, Ohio, and Six Steger, treasurer of Mercer county, Ohio, that they have been sued by Jacob Counterman and Jacob S. Keith, for themselves and others, in the court of common pleas of Mercer county, and that unless they answer, by the 16th day of July, A. D. 1881, the petition of the said Jacob Counterman and others against them filed in the clerk's office of said court such peti-

tion will be taken as true and judgment rendered accordingly. You will make due return of this summons on the 27th day of June, A. D. 1881.

Witness my hand and the seal of said court this 14th day of June, 1881.

T. G. TOUVELLE, *Clerk.*

And afterwards *to* above summons was duly returned indorsed as follows:

THE STATE OF OHIO, *ss:*

Received this writ June 14th, A. D. 1881, at 2 o'clock p. m., and in pursuance to its command I summoned the within-named J. V. Sidenbender, auditor of Mercer county, Ohio, and Six Steager, treasurer of Mercer county, Ohio, on the 17th day of June, 1881, by delivering to each a certified copy of this writ, and I summoned The Board of Trustees of Dublin Township, Mercer County, Ohio, Milt. Hays, Jerry Shingledecker on the same day by delivering to each a certified copy of this writ, and G. W. Reopl on the same day by leaving a certified copy of this writ at his usual place of residence.

JOHN G. BLAKE, *Sheriff.*

88 And afterwards, on the 13th day of July, 1881, the following answer of Jacob Counterman *et al. vs.* The Board of Trustees of Dublin Township *et al.* was duly filed in the clerk's office of said court, to wit:

Answer.

THE STATE OF OHIO, } *ss:*
Mercer County, }

JACOB COUNTERMAN and JACOB KEITH, for Themselves and Others,

against

THE BOARD OF TRUSTEES OF DUBLIN TOWNSHIP, Mercer County, Ohio; J. V. Sidenbender, Auditor of Mercer County, Ohio, and Six Steager, Treasurer of Mercer County, Ohio, Defendants.

The said defendants, for their answer to the petition of the plaintiffs, say that they have no means of knowing whether the said Jacob Counterman and Jacob Keith have the authority and are authorized to sue for the persons named in the petition or not. They therefore deny that they have such power and authority. They deny that the whole taxes averred in the petition to be levied for the years 1880 and 1881 by the trustees of Dublin township for the said purpose averred in the petition are illegal or that the same is without authority.

The said defendants, for second cause of defense, *and* that in pursuance to the law in the petition averred such proceedings were duly had in compliance to the provisions of said law that the election provided for in said law was duly had, resulting in an affirmation vote in favor of providing said line of railway.

That afterwards bonds were duly issued to the extent of twenty thousand dollars, and were duly and regularly sold, in pursuance to the provisions of said law, to persons who are unknown to these defendants, and the money realized therefor.

89 That afterwards the railroad trustees, who had been duly appointed, expended said funds on the construction of the railroad as contemplated by said act.

That all of said several acts and things done were well known to the said Jacob Counterman and Jacob L. Keith and for all persons for whom they bring suit, as they transpired.

That the building of said railroad has largely enhanced the property of the citizens of Dublin township and otherwise is of great value to the said plaintiffs and to the persons for whom they sue.

That the said plaintiffs, each and every one of them and each and all the persons for whom they sue, stood with full knowledge of each and every step taken which is provided in and taken by said law, well knew that the railroad trustees were about to issue and sell the bonds of said township and apply the money to the building of said railroad, and afterward they and each of them well knew that said work was progressing, and that they took no steps — enjoin the building of said road or the issuing of said bonds until the said fund had been exhausted and the said road was fully built.

Whereupon the said plaintiffs and each of the persons for whom they sue are estopped.

These defendants' further defence is that they and each of them are acting merely as trustees, having no benefit or interest in the subject of this action, but that the owners and holders of the bonds above described have the lawful interest thereon; that they are not parties to this action.

Wherefore these defendants pray that the said restraining orders heretofore allowed may be dissolved, and that the petition of plaintiffs may be dissolved, and for such other and further relief as in law they are entitled to.

ALEXANDER, MILLER BROTHERS,
Defendants' Attorneys.

90 THE STATE OF OHIO, } ss:
Mercer County, }

George W. Keepple, being first duly sworn, deposes and says that he is one of the trustees of Dublin township, and that this affidavit is made as well to the answer as to support a motion to dissolve the restraining order hereinbefore granted, and that the facts stated in the foregoing answer are true.

G. W. KOEPEL.

Sworn to by George W. Koepel before me and by him subscribed in my presence this 12th day of July, A. D. 1881.

P. T. ROBINSON, *J. P.*

And afterwards and at the June term, 1881, of said court, this cause came on to be heard, and was disposed of as follows:

Journal.

JACOB COUNTERMAN *et al.*
vs.
THE TRUSTEES OF DUBLIN TOWNSHIP, Mercer County, Ohio, *et al.*

This day came the plaintiff- and moved the allowance of an order of injunction as prayed for in the petition; and the court, being fully advised in the premises, *avers* said order of injunction upon the execution of a bond in the sum of $500.00, to the satisfaction of the court and conditioned according to law.

And afterwards, on the 14th day of June, 1881, the following bond was duly filed in the clerk's office of said court, to wit:

Bond.

Whereas Jacob Counterman and Jacob S. Kieth, for themselves and others, have obtained an order of injunction against the Board of Trustees of Dublin Township, Mercer County, Ohio, and others, in an action pending in the court of common pleas of Mercer
91 county, Ohio, wherein the said Jacob Counterman and others are plaintiffs and the said Board of Trustees of Dublin Township and others are defendants, on giving an undertaking in the sum of five hundred dollars:

Now, therefore, we, Jacob Counterman and Jacob Keith *and* hereby — to the defendants in said action in the sum of five hundred dollars, — that the said plaintiffs shall pay to the said defendants all damages which they may sustain by reason of said injunction if it should be finally desided that said injunction ought not to have been granted.

June 14th, 1881.

J. COUNTERMAN.
J. S. KEITH.
A. DAVIS.
G. LE BLOND.

The above bond with the sureties approved this 14th day of June, 1881.

T. G. TOUVELLE, *Clerk.*

And afterwards, on the 15th day of September, 1881, the following demurrer was duly filed in the clerk's office of said court, to wit:

Demurrer.

In Mercer Common Pleas.

JACOB COUNTERMAN *et al.*
vs.
BOARD OF TRUSTEES OF DUBLIN TOWNSHIP *et al.*

And now comes the said plaintiffs and demurres to the 2nd and

3rd defences set up in the answer, for the reason that the same do not contain facts sufficient to constitute a defence or defences to the petition.

ISAIAH PILLERS,
Att'y for Pl'ff.

And afterwards on the 15th day of September, 1881, the following demurrer was duly filed in the clerk's office of said court, to wit:

92 *Demurrer.*

JACOB COUNTERMAN and JACOB KEITH, for Themselves and Others, Plaintiffs,

vs.

THE BOARD OF TRUSTEES OF DUBLIN TOWNSHIP, Mercer County, Ohio, Defendants.

Now comes the defendant and demures to the reply of plaintiff-, for the reason that it does not state facts sufficient to constitute a defence to the answer of the defendants.

By I. N. ALEXANDER AND
MILLER BROTHERS, *Attorneys.*

And afterwards, at the June term, 1881, this cause came on to be heard and was disposed of as follows:

Journal.

JACOB COUNTERMAN and JACOB KEITH, for Themselves and Others, Plaintiffs,

against

THE BOARD OF TRUSTEES OF DUBLIN TOWNSHIP, Mercer County, Ohio; J. V. Sidenbender, Auditor of Mercer Co., O., and Six Stager, Treasurer of Mercer County, Ohio, Defendants.

This day this cause came on to be heard upon the demurrer of the plaintiff- to the second and third defences in the defendants' answer set forth, and was argued by counsel; on consideration whereof the court does find that the said demurrer is not well taken as to either the said first defences or said second defences. Said demurrer is therefore overruled as to both of said defences; and thereupon the said plaintiff- asked and obtained leave to file a reply herein.

And afterwards, on the 15th day of Sept., 1881, the following reply was duly filed in the clerk's office of said court, to wit:

Reply.

In the Court of Common Pleas, Mercer County, Ohio.

93 JACOB COUNTERMAN and JACOB KEITH, for Themselves and Others, Plaintiffs,

against

THE BOARD OF TRUSTEES OF DUBLIN TOWNSHIP, Mercer Co., O., *et al.*, Defendants.

And now comes the said plaintiff- and for reply unto the answer herein say that they admit that the defendants have no personal or beneficial interest in the subject of the action, and also the defendants have no knowledge as to who is the owner and holder of said pretended bonds; and the said plaintiffs, for further reply unto said answer, say that they deny each and every averment therein contained not hereinafter admitted; and the said plaintiffs further say that they never assented to, but, on the contrary, opposed the enactment of the pretended act of the General Assembly referred to in the petition and answer; that they advised against and voted against the construction of any line of railway pretended to be authorized by said act, and opposed and advised against the doing of any act or thing pretended to be authorized by said act. Plaintiffs further aver that they are wholly ignorant as to who is the owner or holder of said pretended bonds issued under said pretended act, and that they have no means of ascertaining the same, and therefore ask as they have heretofore prayed in their petition.

ISAIAH PILLARS,
Attorney for Plaintiff-.

STATE OF OHIO, }
Mercer County, } *ss:*

Jacob Counterman, one of said plaintiffs, being duly sworn, says that the statements of the foregoing reply are true as he verily believes.

J. COUNTERMAN.

94 Sworn to before me and subscribed in my presence this Sept. 15th, 1881.

T. C. TOUVELLE, *Clerk.*

And afterwards, at the June term, 1881, of said court, this cause came on to be heard, and was disposed of as follows:

Journal.

JACOB COUNTERMAN & JACOB KEITH, for Themselves and Others, Plaintiffs,

against

THE BOARD OF TRUSTEES OF DUBLIN TOWNSHIP, Mercer Co., O.; J. V. Sidenbender, Auditor Mercer Co., O., and Six Stager, Treasurer of Mercer Co., Ohio, Defendants.

This day came the parties to this action in person and by counsel; thereupon this cause came on to be heard upon the demurrer of the plaintiffs to the second and third defences in the answer of the defendants, and was argued by counsel; on consideration whereof the court does overrule said demurrer to both the second and third defences; to which ruling and holding of the court the plaintiffs excepted.

Thereupon the plaintiffs asked and obtained leave to file a reply herein, which was accordingly filed forthwith.

Thereupon the defendants filed a demurrer to the said reply, which then came on and was heard; on consideration whereof the court does find that said demurrer is well taken and does sustain the same.

It is considered by the court that the petition be dismissed and the injunction heretofore allowed in this case be, and the same is hereby, dissolved and discharged, and it is further considered by the court that the defendant- do recover of the plaintiffs the costs in this behalf expended, taxed at $——, and that the plaintiffs pay their own costs.

95

Thereupon the plaintiffs gave notice of their intention to appeal this cause to the district court of Mercer county, Ohio, and the court does fix the amount of appeal bond at one thousand dollars, to be executed with sureties to the satisfaction of the clerk of this court, conditioned according to law.

Recorded November 11th, 1881.

T. G. TOUVILLE, *Clerk.*

Certificate to Common Pleas Record.

THE STATE OF OHIO, } ss:
Mercer County, }

I, Edward Landfair, clerk of the court of common pleas within and for said county, and in whose custody the files, pleadings, journals, records, execution dockets, and seal of said court are required by the laws of the State of Ohio to be kept, hereby certify that the foregoing copy is taken and copied from the records of the proceedings of the court of common pleas within and for said Mercer county, and that said foregoing copy has been compared by me with the original record, and that the same is a correct transcript therefrom.

In testimony whereof I do hereunto subscribe my name officially

and affix the seal of said court, at the court-house in Celina, in said county, this 30th day of May, A. D. 1887.

[SEAL.] EDWARD LANDFAIR, *Clerk.*

96 Mercer County District Court, 1882.

JACOB COUNTERMAN & JACOB KEITH, for Themselves and Others,

vs.

THE BOARD OF TRUSTEES OF DUBLIN TOWNSHIP, Mercer Co., O.; J. V. Sidenbender, Auditor of Mercer Co., O., and Six Stager, Treasurer of Mercer County, O., Defendants.

On appeal.

This day this cause came on to be heard upon the demurrer of the plaintiffs to the 2nd and 3rd ground of defence set up in the answer of defendant-, which was argued by counsel; on consideration whereof the court does find that the said demurrer is not well taken and does overrule the same; to which said rulings of the court the plaintiffs excepts.

Thereupon the plaintiff- asked and obtained leave to file a reply, which said reply was accordingly filed instanter; and thereupon the said defendants filed a demurrer to said reply, which said demurrer was argued by counsel; on consideration whereof the court does find that said demurrer is well taken and does sustain the same; to which ruling of the court the plaintiff- excepts.

It is thereupon considered by the court that the said petition ought to be dismissed.

It is thereupon ordered, adjudged, and decreed by the court that the petition of the plaintiff- be dismissed; and it is considered by the court that the said defendants recover of the plaintiffs their costs in this behalf, taxed at $——; to which said ruling of the court dismissing said case and judgment as to costs the plaintiff- excepts.

97 THE STATE OF OHIO, *City of Columbus:*

Supreme Court of the State of Ohio. January Term, 1882.

JACOB COUNTERMAN *et al. vs.* TRUSTEES OF DUBLIN TOWNSHIP.

Error to the district — of Mercer county, Ohio.

This cause came on to be heard upon the transcript of the record of the district court of Mercer county and was argued by counsel; on consideration whereof it is ordered and adjudged by the court that the judgment of the said district — be, and the same is hereby, reversed for error in overruling the demurrer to the second and third defence- set up in the answer and in sustaining the demurrer to the reply. And this court, proceeding to render the judgment which the said district court should have rendered, do- order and adjudge that the said demurrer to the second and third defense- set up in the answer be, and the same are hereby, sustained, the de-

murrer to the reply overruled, and this cause is remanded to said district court for such further proceedings as may be authorized by law.

It is further ordered that the plaintiffs in error recover of the defendants in error their costs herein expended, taxed at $——. Ordered that a special mandate be sent to the district court of Mercer county to carry this judgment into execution.

I, Dwight Crowell, clerk of the supreme court of Ohio, do hereby certify that the foregoing entry is truly taken and correctly copied from the journal of said court.

98 Witness my hand and seal of said court this 8th day of December, 1882.

DWIGHT CROWELL, *Clerk.* [SEAL.]

STATE OF OHIO, *City of Columbus:*

Supreme Court of Ohio.

To the honorable district court within and for the county of Mercer, Ohio, Greeting:

We do hereby command you that you proceed without delay to carry the within and for-going judgment of our supreme court of Ohio in the case of Jacob Counterman *et al. vs.* Trustees of Dublin Township into execution, the petition in error herein and heretofore granted to the contrary notwithstanding.

Witness Dwight Crowell, clerk of our supreme court of Ohio, at Columbus, this 8th day of December, 1882.

DWIGHT CROWELL, *Clerk.* [SEAL.]

Mercer District Court.

JACOB COUNTERMAN and JACOB KEITH, for Themselves and Others, *against* THE BOARD OF TRUSTEES OF DUBLIN TOWNSHIP, Mercer Co., O., and Others. } No. 110.

SATURDAY, *September 29th*, 1883.

This day this cause came on for hearing upon the demurrer to the 2nd & 3rd defence- set up in the answer, and the court, being fully advised in the premises, is of opinion that said demurrer is well taken. It is therefore ordered that said demurrer to said 2nd and 3d grounds of defence be, and the same is hereby, sustained.

Whereupon this cause came on for trial upon the issues joined in the first defence set up in the answer, and this court, being fully advised in the premises, does find upon said issues in favor of

99 said plaintiff, and the court does further find the averments of said petition to be true. It is therefore considered, adjudged, and decreed that the treasurer of Mercer county, Ohio, be forever enjoined from the collection of all taxes assessed against the

said plaintiffs and those for whom they sue, as prayed for in the said petition.

It is further ordered, adjudged, and decreed that the auditor of Mercer county, Ohio, be, and he is hereby, forever enjoined from placing on the tax duplicate of Mercer county, Ohio, the taxes so levied against said plaintiffs and those for whom they sue, as they have set forth and prayed for in said petition.

It is further ordered, adjudged, and decreed that the Board of Trustees of Dublin Township, Mercer County, Ohio, be forever enjoined from making any levy or certifying any levy of taxes against the plaintiffs or the property of the plaintiffs or those for whom they sue, under and by virtue of this act of the General Assembly of Ohio, recited and referred to in the petition, or by virtue of any proceedings thereunder, as is prayed for in said petition.

It is further ordered and adjudged that the Board of Trustees of Dublin Township, Mercer County, Ohio, pay the costs herein, taxed at $——, out of the township funds, and in default thereof that execution issue therefor.

Certificate to Circuit Court Record.

THE STATE OF OHIO, } *ss:*
Mercer County, }

—, Edward Landfair, clerk of the circuit court, within and for said county of Mercer, and in whose custody the files, pleadings,
100 journals, records, execution dockets, and seal of said court are required by the laws of the State of Ohio to be kept, certify that the foregoing copy is taken and copied from the records of the proceedings of the late district court within and for said Mercer county, and that said foregoing copy has been compared by me with the original record, and that the same is a correct transcript therefrom.

In testimony whereof I do hereunto subscribe my name officially and affix the seal of said court, at the court-house in Celina, in said county, this 30th day of May, A. D. 1887.

EDWARD LANDFAIR, *Clerk.* [SEAL.]

Answer of the Trustees of Dublin Township and the Other Defendants, Except John L. Lameraux.

In the Circuit Court of the United States for the Northern District of Ohio, Western Division.

THE MILFORD FIVE-CENT SAVING- INSTITUTION

vs.

THE TRUSTEES OF DUBLIN TOWNSHIP, Mercer Co., Ohio, CORNELIUS Smith, Henry Van Tilburg, Peter Frysinge, Allen G. Wiley, & John L. Lameraux, Def'ts.

The defendants, for their answer to the amended petition, say that they admit that on the 10th day of April, 1880, the Legislature of

Ohio passed the act which is referred to in the said amended petition and which is found in vol. 77 of the Session Laws of Ohio, at pages 165, 166, 167, and 168, to which for the exact copy of
101 the said law the defendants hereby refer, and which in its entirety, without here rewriting it, they make a part of this their answer.

They admit the appointment of a board of five trustees; that a vote was taken by the electors of the township, and that a majority of the votes were in favor of the construction of the railroad.

They admit that the board of trustees of said railroad, not the township trustees, caused to be prepared and issued the said bonds and coupons in the petition charged, and that the same were sold to the plaintiff; that the coupons alleged in said amended petition and the principle of the bonds have not been paid, and they deny each and every other allegation in said amended petition contained and in each of the various causes of action therein contained.

Second defence.

And for further defence these defendants say that the defendant Lameraux had departed this life long before the commencement of this action, and his estate has been fully settled and administered upon; that no claim was ever presented to his personal representatives by the plaintiff- or any one for them for allowance.

Third defence.

And for a third defence these defendants aver that the act of the General Assembly of the State of Ohio under which all of the proceedings alleged to have been had in said amended petition, including the issuing and sale of the bonds aforesaid, were and are in conflict with the constitution of the State of Ohio; that Dublin township, in Mercer county, is the only township in the State of Ohio to which the said act under its terms or classification could be or was intended to be made applicable; that it is and was a sparsely settled agricultural township, having a population of 1,599 persons
102 only and the only township in the State having the population at the last Federal census named in said act, of 1,599 persons.

That this act was one of a series of acts passed by the said General Assembly for the purpose of contributing the moneys of the townships through which a line of railroad which had been projected and laid out was to run; was to be aided and constructed by taxation on the property of said township, not as an independent railroad in each township, nor to be owned by the township, but for the purpose of constructing a line of railroad to be owned, controlled, and operated by the railroad corporation, which was to be aided in its construction in this way, and the act under consideration was by legislative intent, as well as the intention of the Trustees of Dublin Township, to make the proposed railroad a link in a more extended route or line of railway.

That it was not contemplated at any time, either by the Legislature or the people, that an independent railroad should be constructed

in said township, but that the same should become connected with or consolidated with other roads, and thus to unite the means and credit of the township with those of other parties in order to promote a common enterprise, to wit, the construction of a continuous line of railway, which could not be accomplished without such combination of interests.

That a line of railroad, now known as the Cincinnati, Jackson and Mackinaw railroad, had been surveyed, laid out, and projected from Cincinnati, in the State of Ohio, to Jackson, in the State of Michigan, through said Dublin township and the townships north and south of the same, through which said projected railroad was projected and surveyed.

That said railroad company made it a condition to
103 the building of said railroad on the line aforesaid and through the township aforesaid that each of said townships should raise and contribute towards the building of said railroad a certain amount in the way of local aid; that a number of said townships, towns, and villages through which said railroad ran by voluntary subscriptions raised the amount thus required, and others, not being — to raise the same by voluntary subscription, resorted to legislation such as that in the petition set forth to enable said townships and municipalities by taxation to contribute the amount required by them, and the act in question was one of said acts and in pursuance of said purpose.

That a large number of acts of the Legislature were passed at the same session authorizing said townships through which said railroad was projected to build — railroad within the limits of said townships similar to the act relating to Dublin township averred in said petition.

That all of said townships are geographically situated on the continuous line of said projected railroad.

That in each of said townships the line of railroad proposed was of such length and expense that the amount authorized to be expended in constructing said railroad by such townships, respectively, was not one-fifth part of the amount absolutely necessary to construct such railroad, without any equipment or any of the appliances for operating the same.

That none of said laws, including that relating to the defendant, gave said trustees or any of them any authority to complete said railroad in the said township or to equip or operate the same, and none of said townships has any authority under the laws of Ohio so to do.

That the officers of said railroad company, its agents and
104 *and* attorneys, prepared said different acts of the Legislature and personally solicited their passage.

That the said road authorized to be built in said Dublin township was seven miles in length and the actual cost was not less than seventy-five thousand dollars.

That it was built and completed by said railroad company on its projected and surveyed line, and a lease of such railroad as was

built by the proceeds of said bonds leased to said company for 99 years, renewable in periods of 99 years thereafter.

And defendants aver that all of the facts before alleged as to said contemplated railroad, and the additional fact that it was projected through a sparsely settled agricultural territory, through townships having a population as low as 500 persons, and that the townships thus authorized by said various acts of the Legislature to construct roads were geographically situated so as to form a continuous line of railroad, were well known to the people of the State and to the members of the Legislature, the people of the various townships, the officers of the railroad company, and, at the time of their purchase of said bonds, to the plaintiff.

They aver that the supreme court of the State of Ohio have held and decided that the law in question and similar statutes passed for the promotion of the same and like projects were in violation of the constitution of the State of Ohio, and therefore void.

And these defendants especially deny the allegations of the petition that the said act or any similar act was ever declared or held to be valid in any decision in the State of Ohio by the supreme court thereof, or that the same is in any manner similar to the case of Walker *vs.* Cincinnati, reported in 21 O. S. Reports. By
105 uniform line of decisions legislation similar to that in question has been held and *delivered* to be invalid.

Fourth.

And for a fourth defence these defendants aver and say that after the said bonds were issued Jacob Counterman and Jacob S. Keith, tax-payers of said township, brought suit in the court of common pleas of Mercer county for and in behalf of themselves and all other tax-payers of the county, as authorized by the laws of the State of Ohio, nearly all of whom unite in the said action in the same form, authorized by law, as complainants, to the number of 65, and constituting a large majority in number and amount of the tax-payers of said township, against The Board of Trustees of Dublin Township, Mercer County, and the Auditor and Treasurer of the County, to enjoin the collection of taxes upon the property of said township for the purpose of paying the said bonds of the plaintiffs and the other expenses incurred under and by virtue of the act aforesaid, averring that all of said proceedings are illegal and void because the act in question was unconstitutional.

That the defendants made defence to said action upon the merits, and the same resulted in a decree perpetually enjoining the defendants, The Trustees of said Township and the Auditor and Treasurer of the County, from collecting or attempting to collect or enforce taxes provided for in said act or any taxes for the purpose of paying anything upon said bonds or coupons or the other expenses growing out of the proceedings authorized by said act.

That the said case is reported in 38 O. S. Reports, at page
106 515, and a copy of the record in said case these defendants file herewith as a part of this answer, and to which reference is here made for a more full and accurate description of the parties

and issues therein, as well as the judgments and decrees rendered therein.

And these defendants aver that it would be impossible, in view of said decree, to enforce against the property of said township any taxation whatever for the purposes of paying anything to the plaintiff- upon said bonds or coupons.

Fifth.

And these defendants further aver and say that on the 30th day of August, 1884, there was filed in the district court of Mercer county a petition by the plaintiff in this action, as relator, against The Trustees of Dublin Township and the Auditor of said Mercer County, wherein all of the facts related in the petition in this case were averred by the relator, as shown by the record in said case, hereto attached and made a part hereof, and praying for a writ of mandamus commanding the Trustees of Dublin Township to levy upon the taxable property of the township an amount necessary to pay the interest and principle of said bonds as they mature, and to require the auditor to place the same upon the tax duplicate of the county.

That an alternative writ of mandamus issued in this action, returnable according to law.

That the defendants answered in that action, as shown by said record, hereto attached and made a part of this answer, and thereupon the said cause came on for trial upon the merits, the plaintiff having demurred to a part of the answer, as shown by said record, and judgment and decree *was* entered in said cause finding
107 that the defence set up in said answer was good and valid in law and dismissing said petition of the plaintiffs upon the merits, refusing to grant the prayer thereof. An exemplified copy of the record in said cause, as heretofore stated, is attached hereto and made a part of this answer.

And plaintiff- avers that said judgment was entered by the circuit court of Mercer county, to which court all causes pending in the district court was transferred by law, and which court had jurisdiction of said cause, and the said judgment and decree of the said court stands unreversed and in full force.

Sixth.

And these defendants, further answering, say that said Cornelius Smith, Henry Van Tilburg, Peter Frysinger, Allen G. Wiley, and the said John L. Lameraux, during his said lifetime, in all the transactions averred in the plaintiffs' petition acted as public officers, appointed under and by virtue of the act aforesaid and not in any sense in their individual capacity.

That the plaintiffs well knew that their entire action was under and by virtue of the appointment as such public officers and the power conferred upon them by the said act, and in the dealings and transactions aforesaid that they were acting solely as the representatives of the public, with no other authority and professing no other authority than that conferred upon them by the said law; that the

plaintiff- ought not to have and maintain their said action against them as individuals for the reason aforesaid, and that they personally did not, nor did any of them, receive any individual benefit or enter into any individual arrangement or contract with the plaintiffs or any one for them.

108 Seventh.

Reiterating and reaverring all the allegations of said third defence the same as if again here rewritten, and making the same a part hereof, the defendants further say that it is provided by section 6, article 8, of the constitution of the State of Ohio, in force at the time of the passage of the act of the General Assembly aforesaid and still in force, "that the General Assembly shall never authorize any county, city, town, or township, by a vote of its citizens or otherwise, to become a stockholder in any joint-stock company, corporation, or association whatever, or to raise money for or loan its credit to or in aid of any such company, corporation, or association."

That under the act in question it was the purpose and design of the act, as shown by its terms and concurrent legislation authorizing their townships to vote aid to the completion of the general scheme of building a railroad, to furnish the public credit or money of the township to be used in a part of the construction of a railroad which it was well known to the people and to the plaintiffs must be completed, if completed at all, by other parties out of their own means, and who were to own and have the beneficial control and management thereof when completed.

That the provisions of said railroad law, meaning the act of the General Assembly aforesaid, were known to all the people, including the plaintiffs, to be impossible of being carried out or executed, except as a means of aiding in the construction of a line of railroad which could not and was not intended to be owned or operated by said township.

That the said railroad would have no value as a line of
109 railroad extending simply from one end of the township to the other, and no value except as a part of a system which was well understood to have been projected by parties who were seeking this method of obtaining aid from the said township.

That it was well known and understood by all people, including the plaintiffs, who gave the matter any consideration whatever, that the act in question was intended as an evasion of the provisions of the constitution aforesaid.

That there was no provision in the said act by which it would be possible for the said township to equip, control, or operate said railroad when built.

That the act in question and the scheme therein contemplated, together with the concurrent legislation in reference to the same projected railway, was similar to that which had been decreed by the supreme court of the State of Ohio to be in plain violation of the constitution of the State of Ohio in the case of Taylor *vs.* The Commissioners of Ross County, 23 O. S. Reports, page 22, which decision had been made after the case mentioned in the petition of

the plaintiff of Walker *vs.* Cincinnati, 21 O. S. Reports, page 15, and which was in full force and the law of the land at the time of the passage of the act of the General Assembly under which said bonds were issued.

Wherefore these defendants pray that said petition may be dismissed, and that they may recover their costs.

MARSH AND LOVE AND
DOYLE AND SCOTT,
Attorneys for Defendant.

THE STATE OF OHIO, } ss:
Lucas County, }

John H. Doyle, being duly sworn, says he is one of the attorneys for the defendants duly authorized herein; that said defendants are all absent from the county of Lucas, and that the facts stated
110 and allegations contained in said answer are true, as he believes.

JNO. H. DOYLE.

Sworn to before me and subscribed in my presence May 13, 1887.

CHAS. F. LEWIS,
Notary Public, Lucas County, Ohio.

Proceedings before the Honorable J. J. Moore, Thomas Bur, and Henry W. Sumy, judges of the circuit court within and for the county of Mercer and State of Ohio, at the June term thereof, begun and held at the court-house, in Celina, on the 15th day of June, A. D. 1885.

THE STATE OF OHIO on Relation of MILFORD FIVE-CENT SAVINGS INSTITUTION

vs.

THE TRUSTEES OF DUBLIN TOWNSHIP, Mercer County, Ohio, and JOSEPH SIDENBENDER, Co. Auditor.

Be it remembered that heretofore, to wit, on the 30th day of August, A. D. 1884, came the State of Ohio, *in* relation of The Milford Five-Cent Savings Institution, and filed its certain petition in the clerk's office of said county against The Trustees of Dublin Township, Mercer County, Ohio, and Joseph Sidenbender, county auditor, and which petition is in the words and figures following, to wit:

Petition for Mandamus.

In District Court.

THE STATE OF OHIO, *Mercer County,* } ss:

THE STATE OF OHIO on Relation of MILFORD FIVE-CENT SAVINGS INSTITUTION, a Body Corporate, Pl'ff,

vs.

THE TRUSTEES OF DUBLIN TOWNSHIP, Mercer County, Ohio, and JOSEPH SIDENBENDER, Auditor of Mercer Co., Ohio, Def'ts.

The relator, "Milford Five-Cent Savings Institution," which is a body corporate, represents to said court that in the
111 year A. D. 1880—the month and date the relator cannot allege—the electors of said Dublin township, Mercer county, Ohio; desired to avail themselves of the provisions and benefits of a certain act of the General Assembly of the State of Ohio, entitled "An act to authorize certain township- to build railroads and lease or operate the same," which passed and took effect April 10th, 1880, in order to construct for said township a certain railroad in said township known as the Celina, Van Wert and State Line Extension of the Columbus and Northwestern railway, and in furtherance of said purposes the requisite number of the tax-payers of said township petitioned the trustees of said Dublin township to pass a resolution declaring it to be essential to the interests of said township that a line of railway should be constructed on the line designated in said petition and on the line of the aforesaid railway now leased by the Cincinnati, Van Wert and Michigan Railway Co., and that said line was named in said petition, and that said Trustees of Dublin Township, in accordance with the provisions of the first section of said act, did pass the said resolution declaring the necessity of said line of railway to be constructed and ordered. In accordance with said section a special election was ordered by said township trustees for the electors of said township to vote on the question to be submitted to them under said act and in pursuance of said resolution, and that more than twenty days' notice of the time and place of holding said special election was given as required in said section, as to the place and all other particulars, and at the time and place named in said notice so published the electors of said township decided, by much more than a majority, in favor of said line of railway, and that due returns of said election were
112 made to the clerk of said township, and by him laid before said trustees of said township, who declared the result of said election by resolution, as said section of said act directs.

Your relator further represents that after the declaration of said result by said trustees as aforesaid they nominated five trustees, electors and freeholders of said township, known and designated as "the board of trustees of the Celina, Van Wert and State Line Ex-

tension of the Columbus and Northwestern Railway Company," which nomination was presented to the judge of the court of common pleas of said county, who approved of said nomination and ordered an entry thereof to be made in the records of said court, and that each of said trustees so nominated and approved gave bond and otherwise qualified as required by the second section of said act.

The relator further represents and avers that in order to construct said line of railway in said township said board of trustees of said railway for said township, in pursuance of said election and proceedings had thereafter and as authorized by said act, decided to issue bonds and borrow money therein in the sum of $10,000.00, and did borrow of the firm of Emmerson, Marble and Co., then of Van Wert, Ohio, said sum of $10,000.00, and for the payment of which said trustees of said line of railway, on the 1st day of June, 1880, executed and delivered to said Emmerson, Marble & Co. bonds of said township and in its name, about eight for $500 each and six for $1,000.00 each, and each bearing interest at six per cent. and the interest payable July 1st and January 1st of each year, said bonds payable July 1st, A. D. 1900. A copy of one of said bonds is as follows:

"$500.00. STATE OF OHIO, *Mercer County.*

"Act of the General Assembly of Ohio, passed April 10, 1880.

113 "The board of trustees of the Celina, Van Wert and State Line Extension of the Columbus and Northwestern Railway Company acknowledge to have borrowed for the use of Dublin township, Mercer county, Ohio, and that said township is indebted to and on behalf of said township promise to pay to Emmerson, Marble & Co. or bearer the sum of five hundred dollars on the 1st day of July, A. D. 1890, at the First National Bank in New York, with interest at the rate of six per cent. per annum, payable semi-annually on the 1st day of July and January each year, at the First National Bank in New York city, on surrender of the proper coupon hereto attached.

"In witness whereof the president of said board has signed and sealed this the bond of said township, and the same has been attested by the clerk of said township on the 1st day of June, 1880.

"HENRY VAN TILBURG, [SEAL.]
"*President.*

"Attest: JOHN W. MILLER,
"*Clerk of Dublin Township, Mercer County, Ohio.*"

And that each of the other bonds is similar in form and substance, except said number- thereof are the denomination of $1,000.00; and, further, that said interest coupons were attached to said bonds, of which the following is a specimen copy:

"$30.00. *Interest Warrant.*

"On the 15th day of July, A. D. 1882, Dublin township, Mercer county, State of Ohio, will pay the bearer the sum of thirty dollars at the First National Bank, in New York city, being 54 months' interest on bond No. 1, dated June 1st, 1880.

"JOHN A. MILLER,
"*Township Clerk.*"

The relator further represents that, having received said borrowed money, said board of railway trustees proceeded to cause said line of railway to be constructed, and delivered said bonds, with said coupons attached, to said Emmerson, Marble & Co., and that
114 afterwards and before said coupons became due, in good faith and in the usual course of business, the relator purchased said bonds, with said coupons attached, and, except the coupons for the year 1881, which were paid, the relator is now the *bona fide* owner thereof.

The relator avers that said Trustees of Dublin Township made a levy on the taxable property of said township in the year 1880 to pay the interest on said bonds represented by said coupons, and certified the same to the auditor of said Mercer county, who placed the same on the tax duplicate of said county against the taxable property of said township, and by means whereof the treasurer of said county collected taxes for said township, with which the interest for the year 1881 on said bonds was paid, but that there is more due to the relator from said township by virtue of the facts and proceedings aforesaid.

The interest on said bonds falling due July 1st, 1882, $360.00; Jan. 1st, 1883, $360.00; July 1st, 1883, $360.00; January 1st, 1884, $360.00, and July 1st, 1884, $360.00, for which the relator holds the coupons.

That after paying the said interest for the year 1881 said Trustees of Dublin Township failed and neglected to make levies for the payment of said interest now due, and the auditor of said county took said tax off the duplicate of taxes for said township and refuses to enter any levy thereon to pay said interest or reduce said bonds; all of which has been requested by said trustees and said auditor.

The relator further represents and avers that said line of railway with said borrowed money was constructed in said township on the route described in the said petition and proceedings thereafter, and said township and its citizens are enjoying the full benefit and
115 convenience of said line of railway, and said citizens and tax-payers of said township and its said trustees, before said bonds were issued, leased said line of railroad to the Cincinnati, Van Wert and Michigan Railway Company and received, in consideration of the same, $20,000.00 in same bonds which are now owned by said township, knew that said bonds were about to be issued and said money borrowed thereon and said bonds were about to be negotiated and made no objection thereto, and that the relator,

believing said bonds to be valid and before any adverse adjudication had been made concerning said act, purchased the same.

The relator therefore prays that a writ of mandamus may issue to said defendant, commanding the Trustees of said Dublin Township to make the levy on the taxable property of said township necessary to pay interest accrued and the accruing interest and to pay said bonds as they mature, and to certify the same to the auditor of said county to be placed on the duplicate, and that said auditor do place said levy so made on said duplicate as in other cases, and for such other directions to said defendants as are necessary to protect the rights of the relator.

JAMES L. PRICE,
Att'y for Relator.

THE STATE OF OHIO, }
Allen County, } *ss:*

J. L. Price, being sworn, says the facts alleged in the foregoing are true as he verily believes, and that said relator is a non-resident of Ohio.

J. S. PRICE.

Sworn to before me and signed in my presence Aug. 26, 1884.
DAVIS J. CABLE,
Notary Public.

And afterwards in said cause the following entry was made, to wit:

116 *Petition for Mandamus.*

Mercer County District Court.

THE STATE OF OHIO on Relation of MILFORD FIVE-CENT SAVINGS INSTITUTION, Plaintiff,
vs.
THE TRUSTEES OF DUBLIN TOWNSHIP, Mercer Co., Def'ts.

Application for alternative writ before Judge C. M. Hughes, at chambers.

On motion of the relator in the above cause, and upon exhibiting its petition therefor in due form, it is ordered by me that an alternative writ ofmandamus be, and hereby is, allowed and directed to be issued forthwith in the above-entitled cause against the defendants therein named, and returnable on the 12th day of September, 1884, directing them to do the matters and things complained of against them in said petition, or on said day by answer to show cause why they should not do the same.

Ordered that the foregoing be entered on the journal of the district court of Mercer county, Ohio.

CHAS. M. HUGHES,
One of the Judges of the District Court in and for Mercer County, Ohio.

And afterwards, on the 12th day of September, 1884, came the defendants, The Trustees of Dublin Township, Mercer County, Ohio, and filed their demurrer to the petition of the plaintiffs, which is in words and figures following:

117 *Demurrer.*

THE STATE OF OHIO, *Mercer County:*

In District Court.

THE STATE OF OHIO on Relation of MILFORD FIVE-CENT SAVINGS INSTITUTION, Plaintiff,

vs.

TRUSTEES OF DUBLIN TOWNSHIP, Mercer County, Ohio, and JOSEPH SIDENBENDER, Auditor of Mercer County, Defendants.

And now comes the defendants and demurs, and for grounds of demurrer say:

The petition does not state facts sufficient to constitute a cause of action.

MARSH AND LOWER,
Att'ys for Def'ts.

And thereupon the following entry was made:

THE STATE OF OHIO on Relation of MILFORD FIVE-CENT SAVINGS INSTITUTION, Pl'ff,

vs.

THE TRUSTEES OF DUBLIN TOWNSHIP *et al.*, Def'ts.

This cause was heard on demurrer of defendants to plaintiff's petition, and was argued by counsel; on consideration whereof the court do overrule said demurrer, and leave is given defendants to answer by January 1st, 1885.

It is further ordered that plaintiff give security for costs.

Afterwards, to wit, on the 28th day of November, 1884, defendants filed answer in words and figures following:

Answer.

THE STATE OF OHIO:

In District Court of Mercer County.

THE STATE OF OHIO on Relation of MILFORD FIVE-CENT SAVING-INSTITUTION, Pl'ffs,

vs.

THE TRUSTEES OF DUBLIN TOWNSHIP, Mercer County, Ohio, *et al.*, Def'ts.

I defence.

The defendants for answer say they have no means to know that the Milford Five-Cent Savings Institution is a body corporate; they therefore deny that said plaintiff is a body corporate.

They deny that all the citizens of Dublin township are enjoying benefits or conveniences of the line of railway described in
118 said petition. They deny that all the citizens and tax-payers of said township knew that said bonds were about to be or were negotiated.

They deny that all the electors or tax-payers of said township desired to avail themselves of the provisions of the act set out in plaintiff's petition.

II defence.

For a second defence the defendants say that Milton Hays, Geo. Frysinger, and Simon Kiser are the legally qualified trustees of Dublin township, and as such are the defendants, with Joseph Sidenbender, auditor, as codefendant herein; that they and each of them, as said trustees, have no beneficial interest in the subject of this action; that the tax asked to be levied by these trustees for the purposes set out in the petition of the relators is illegal and without any authority of or validity in law, and in violation of the rights of the tax-payers of said township of Dublin.

III defence.

Said defendants further say that a large number of the citizens, and who are tax-payers of said township, to wit, Jacob Counterman, Jacob Keith, Abel Hardin, P. C. Hardin, Emanuel Grosnickel, Z. Sutton, Godfrey Harmon, F. Mutuspaugh, Elias Deal, J. W. Fox, E. M. Halfhill, Hiram Allen, W. M. Feyer, Levi Rutledge, Lewis Higgins, Thomas Sanift, Perry Harris, Elijah Rhodes, Elisabeth Rhodes, Peter A. Miller, Martin Harmon, Isaac Harris, W. M. Rutledge, Hiram Clutter, J. Lester, Eli Maetz, P. Maetz, J. M. Sutton, Sylvester Sutton, W. Custer, S. D. Burns, S. H. Clark, W. Davis, J. W. Tullis, M. Adams, R. Ketchem, Levi Dyrut, G. W. Purdy, S. F. Hays, John Shinmebury, Allen Jameson, A. W. Frysinger, L. Rice, L. Williams, A. Ketchum, W. S. Custer, A. C. Harper, J. C.
119 Fast, J. Carter, M. P. Hawk, Geo. Donavan, E. Donavan, Jos. W. Dyrest, J. H. Robison, Catharine Robinson, Daniel Huffman, S. W. Dyrest, John Mutuspaugh, N. E. Webb, John O'Neil, A. V. Gundy, John Putnam, James V. Gundy, E. B. McCaig, J. F. McCaig, Geo. W. Petro, Enos Allen, C. C. Stofer, Joseph Drake, M. R. Hays, un — Palmer, Thomas Palmer, Jr., G. E. Chivington, H. J. Palmer, Sam. Chivington, O. P. Farris, J. W. Harris, G. W. Siler, Jos. Williams, Thom. McLaughlin, and Thos. Palmer, Sr., have been relieved of the payment of any tax or the assessment of any tax against them or either of them for the purposes for which the said plaintiffs ask the tax to be levied, and these defendants, Trustees of said Dublin Township and their successors in office, have been forever enjoined by this court from the levy of any tax upon the property of the persons above named or either of them for the purpose averred in plaintiffs' petition. Said defendants therefore ask to be dismissed with their costs.

MARSH AND LORCE,
Att'ys for Def'ts.

THE STATE OF OHIO, } ss:
Mercer County, }

Milton Hays, one of the trustees and defendant, says he believes the facts stated and allegations in the foregoing answer to be true.

MILTON HAYS.

Sworn to before me and signed in my presence this 23rd day of September, 1884.

EDWARD LANDFAIR, *Clerk.*

Afterwards and on the 5th day of June, 1885, came the plaintiff and filed demurrer to the answer of defendant-, which demurrer is in the following words:

120 *Demurrer.*

THE STATE OF OHIO, } ss:
Mercer County, }

Circuit Court.

THE STATE OF OHIO on Relation of the MILFORD FIVE-CENT SAVINGS INSTITUTION, a Body Corporate, Pl'ff*t*,

vs.

THE TRUSTEES OF DUBLIN TOWNSHIP, Mercer County, Defendants.

The plaintiff demurrs to the 2nd defence in the answer of the defendants because the same does not state facts sufficient to constitute a defence to plaintiff's petition, and plaintiff also demurs to the 3rd defence in said answer because it does not state facts sufficient to constitute a defence to plaintiff's petition.

PRICE AND OVERMYER,
Attorneys for Plaintiffs.

And afterwards, to wit, at the June term of said court, the following entry was made, to wit:

In Circuit Court for Mercer County.

MILFORD FIVE-CENT SAVINGS INSTITUTION, Pl'ff,

vs.

THE TRUSTEES OF DUBLIN TOWNSHIP and J. V. SIDENBENDER, Auditor of Mercer Co., Def'ts.

This cause came on to be heard upon the demurrer to the answer of the defendant-, Trustees of Dublin Township, and was argued by counsel, and the court, being fully advised in the premises, do find that said demurrer is not well taken, and do not allow the same; and further find and adjudge that the writ of mandamus prayed for in the petition of plaintiffs ought not to be allowed and said
121 writ is refused. It is further adjudged by the court that the

defendants recover of the plaintiffs their costs, taxed at $——, and execution issue therefor; to which findings and judgments of the court the plaintiffs, by *his* counsel, excepts.

Certificate to Circuit Court Record.

THE STATE OF OHIO, } ss:
Mercer County, }

I, Edward Landfair, clerk of the circuit court within and for said county of Mercer, and in whose custody the files, pleadings, journals, records, execution dockets, and seal of said court are required by the laws of the State of Ohio to be kept, hereby certify that the foregoing copy is taken and copied from the records of the proceedings of the circuit court within and for said Mercer county, and that said foregoing copy has been compared by me with the original record, and that the same is a correct transcript therefrom.

In testimony whereof I do hereunto subscribe my name officially and affix the seal of said court, at the court-house in Celina, in said county, this 5th day of May, A. D. 1887.

[SEAL.] EDWARD LANDFAIR, *Clerk.*

And thereupon said plaintiff files its demurrer thereto as follows:

Demurrer.

In Circuit Court of the U. S., N. D. Ohio, Western Div.

THE MILFORD FIVE-CENT SAVINGS INSTITUTION, Pl'ff,

vs.

THE TRUSTEES OF DUBLIN TOWNSHIP, Mercer County, Ohio, *et al.*, Defendants.

122 Demurrer to fourth defence.

The said plaintiff, a body corporate, now comes and demurrs to the fourth defence set out in the answer of the defendants because the said defence does not state facts sufficient to constitute a defence to plaintiff's petition.

Demurrer to fifth defence.

And said plaintiff demurs to the fifth defence contained in the answer of the defendants because said defence does not state facts sufficient to constitute a defence to plaintiff's petition.

Demurrer to sixth defence.

And the said plaintiff demurs to the sixth defence contained in the answer of said defendants because the same does not state facts sufficient to constitute a defence to the plaintiff's petition.

Demurrer to seventh defence.

And plaintiff demurs to the seventh defence contained in the said

answer of the defendants because said defence does not state facts sufficient to constitute a defence to the petition of the plaintiff.

J. C. LEE AND
JAMES L. PRICE,
Att'ys for Plaintiffs.

Demurrer.

Circuit Court of United States, Western Division of Northern District of Ohio.

THE MILFORD FIVE-CENT SAVINGS INSTITUTION
vs.
DUBLIN TOWNSHIP *et al.*

Now comes the plaintiff and demurs to the third ground of defence, as set forth in the answer of the defendants, for the reason that the same does not contain facts sufficient to constitute a defence to the petition of the plaintiff.

Wherefore it prays the judgment of the court.

JAMES L. PRICE &
LEE & BROWN,
Att'y- for Pl'ff

123 And afterwards, to wit, on the 11th day of October, 1887, the following judgment and certificate of division in opinion was filed in the clerk's office in this cause, and by direction of court entered *nunc pro tunc* as of the 28th day of July, A. D. 1887, the same being a day of the June term, A. D. 1887, of said court. The said judgment and certificate of division in opinion were as follows, viz:

THE MILFORD FIVE-CENT SAVINGS INSTITUTION
vs.
DUBLIN TOWNSHIP.

This cause having been heretofore submitted to the circuit judge and the district judge and having been considered upon the law presented by the demurrers of plaintiff to the answer of the defendant, it is found by the court in conformity with the opinion of the circuit judge as follows:

This day came the parties, with their attorneys, and thereupon, this cause having come on for hearing on the demurrer of the plaintiff to the several defences contained in the answer of the defendants, and having been argued by counsel, and the court being fully advised, do find and are of the opinion that as to said defences Nos. two and six said demurrer is not well taken, and that as to said defendants, the individual defendants, said defences are good in law, and the demurrers thereto should be, and the same are, ordered to stand overruled; and the plaintiff not wishing to reply to said
123½ defences, it is ordered by the court that said individuals, the individual defendants, have judgment against the plaintiff for their costs herein, and that they go hence without day.

And the court also are further of the opinion and do find that the said demurrers of the plaintiff to each and all of the several other defences in said answer contained are well taken, and the same should be, and they are hereby, sustained; and the defendant, the said Dublin Township, not wishing further to answer to the amended petition of plaintiff, it is adjudged and ordered by the court, in accordance with the opinion of the presiding judge, that the plaintiff recover of the defendant, on account of said several coupons in the said several causes of action, from No. 1 to No. 26, inclusive, the sum of three thousand eight hundred and nineteen dollars and fifteen cents ($3,819.15), and that the same bear interest from the first day of this term of this court, to wit, June 7th, A. D. 1887; to all of which findings and rulings of the court sustaining said demurrers and rendering judgment in favor of plaintiff the defendant, said Dublin Township, then and there excepted and now excepts.

And the plaintiff thereupon asks and obtained leave of the court to withdraw his cause of action No. 127, which was accordingly done.

And the court having certified a division of opinion upon the questions of law involved herein, it is ordered that a certificate of such division, under the seal of the court, be sent to the Supreme Court of the United States for its final determination.

Certificate of Division in Opinion.

124 And thereupon the said action came on for hearing upon the demurrer of said plaintiff to the answer of said defendant, Dublin Township, and the same was submitted upon a full argument of the same; and upon the said question whether said demurrer should be overruled or sustained to the various defences set forth by said Dublin township there occurred as questions of law the following:

First. Whether the said answer showed that the law under which the bonds sued upon were issued was in conflict with the constitution of the State of Ohio and therefore void.

Second. Whether, if said legislation is in conflict with the constitution of the State of Ohio, there had been such decision of the State courts prior to its passage and to the sale or negotiation of the bonds alleged in the petition; that such and similar legislation was constitutional and valid as entitles the plaintiffs to recover under the decisions of the Federal courts, notwithstanding the act in question had been declared to be unconstitutional by the court of last resort in the State of Ohio after said bonds were sold.

Third. Whether the former suits, actions, and proceedings in the State courts or any of them alleged in said answer were and are such adjudication of the questions involved in this action as amounts to a bar to the plaintiffs' right to recover herein.

Upon each of said questions of law the opinion of the judges were opposed, and judgment entered in accordance with the opinion of the presiding judge.

124½ Thereupon, and on motion of the said defendants that the points on which the disagreement has been made during the term be stated under the direction of the judges and certified under the seal of the court to the Supreme Court of the United States to be finally decided—

It is ordered that the foregoing state of the pleading and of the questions on which the opinion of the judges were opposed, all of which are made under the direction of the judges, be certified to the Supreme Court accordingly and pursuant to the statute in such cases made and provided.

HOWELL E. JACKSON,
Circuit Judge.

M. WELKER,
District Judge U. S., So. District.

125 *Certificate.*

UNITED STATES OF AMERICA, *Northern District of Ohio,* } *ss:*

I, Augustus J. Ricks, clerk of the circuit court of the United States for said district, do hereby certify the above and foregoing to be a true, correct, and complete transcript of the record of all the proceedings had in said court in the case wherein The Milford Five-Cent Savings Institution is the plaintiff and The Trustees of Dublin Township, Mercer county, Ohio, and Cornelius Smith, Henry Van Tilburg, Peter Frysinger, Allen G. Willey, and John L. Lameraux are the defendants, as the same appears from the files and records of said court now remaining in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at my office, in Toledo, in said district, this sixth day of January, A. D. 1888, and in the 112th year of the Independence of the United States of America.

[Seal of the Circuit Court, North'n Dist. of Ohio.]

AUGUSTUS J. RICKS,
Clerk Circuit Court of the United States,
Northern District of Ohio.

126 In the Supreme Court of the United States. Oct. Term, 1888.

THE TRUSTEES OF DUBLIN TOWNSHIP
vs.
THE MILFORD FIVE-CENT SAVINGS INSTITUTION. } No. 943.

It is stipulated herein that in printing the record in this cause the causes of action in the petition of the plaintiff, numbered from second to one hundred and twenty-sixth, inclusive, may be omitted,

they being but repetitions on different coupons of the same matters as alleged in the other causes of action.

LEE & BROWN,
J. C. LEE,
Att'y- for Def't in Error.
JOHN H. DOYLE,
Att'y for Plaintiff in Error.

127 [Endorsed :] Sup. Court U. S. Oct. Term, 1888. No. 943. The Trustees of Dublin Township, Mercer County, Ohio, pl'ffs in error, *vs.* The Milford Five-Cent Savings Institution. Stipulation to omit part of record in printing.

[Stamped :] Office Supreme Court U. S. Filed Aug. 27, 1888. James H. McKenney, clerk.

Endorsed on cover : N. Ohio C. C. U. S. No. 943. The Trustees of Dublin Township, Mercer County, Ohio, plaintiff in error, *vs.* The Milford Five-Cent Savings Institution. Filed January 18, 1888.

Office Supreme Court U. S.
FILED.
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JAMES. H. McKENNEY,
CLERK.

THE SUPREME COURT OF THE UNITED STATES.

Dublin Township,

Plaintiff in Error,

—*vs.*—

The Milford Five Cent Savings Institution,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR,

ON MOTION TO DISMISS.

JOHN H. DOYLE,
Of Counsel for Plaintiff in Error.

BARKDULL PRINTING HOUSE, TOLEDO.

THE SUPREME COURT OF THE UNITED STATES.

Dublin Township,

Plaintiff in Error,

vs.

The Milford Five Cent Savings Institution,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR,

ON MOTION TO DISMISS.

The questions involved are very important in themselves, but are rendered specially so by the condition the case is in. The Supreme Court of Ohio has declared the law under which these bonds were issued to be unconstitutional and void.

Wyscaver vs. Atkinson, 37, O. S. 80.
Counterman vs. Dublin Twp. 38, O. S. 515.

In the latter case some eighty of the tax payers of the township, which has altogether a population of only 1599, (see page 24 of printed record) have obtained injunctions perpetually restraining the officials

of the County from ever levying any tax to pay those bonds or any part thereof.

In addition to this the defendant in error prosecuted an action in the State Court for a mandamus to compel the levy of a tax to pay these same coupons, (see page 30, printed record,) and upon the issue therein, final judgment was rendered for the defendant, the present plaintiff in error.

I.

The questions involved in the certificate of division were made in perfect good faith by the Court. This Court will assume that, and we make no further answer to any intimation that the certificate was merely formal.

II.

Three distinct briefs have been filed by counsel for the motion, and in each of them there is the same error, viz: That the decision of the demurrer disposed of the case and entitled them to judgment. If this was so, then a demurrer should have been interposed to the first defense, which under the Ohio practice, puts in issue every fact alleged in the petition not expressly admitted. That it presented an issue on which the burden was on the plaintiff, was certainly their opinion, because no demurrer was interposed to it.

Let us examine the condition of the pleadings at the time the Court divided on the questions raised by the demurrer.

The plaintiff filed its petition alleging one hundred and twenty-seven causes of action. The first to and

including the one hundred and twenty-sixth, were on coupons attached to the bonds, and which had matured.

The allegations of the first cause of action, condensed, are :

1. The corporote character of the plaintiff.

2. The corporate character of the defendant.

3. The passage of the act of April 10, 1880, the terms of which the petition attempts to recite, and that the act itself will be found in 77 Ohio Laws, pages 165, etc., and in the 127th cause of action.

4. That the act was introduced into and passed by the legislature on the petition of a large number of tax payers, and electors of Dublin township.

5. That the electors of the township, which was such a township as said act describes, in compliance with said act, availed themselves of its provisions. The Trustees were appointed; entered upon their duties, and are a legal board at date of filing petition. That the vote was taken and the bonds issued by the board of trustees. That they were sold for not less than par, and were in good faith purchased and received by plaintiff.

6. That plaintiff paid for said bonds $12,400, which was received by said board of trustees for the purpose of constructing said railroad in Dublin township, and said $12,400 was thereafter, in all respects, and in conformity to said act, used by said board of trustees in procuring right of way for, and in constructing said line of railway in said Dublin township, whereby said township became and yet is the owner

and holder of said line of railway, which became, was and is of great value to the said township, to-wit: in a sum exceeding $12,000.

7. That at the time plaintiff so advanced and lent said $12,000 and received said bonds, it acted in all respects in good faith, fully believing that the township had power to borrow said $12,000, and execute the bonds, and the property of the township stood pledged, etc.

8. That plaintiff became the owner of said bonds, etc., before maturity, in good faith, for a valuable consideration, and the act of the legislature was in harmony with *Walker vs. Cincinnati*, etc., and a constitutional and valid law.

9. And that plaintiff is now the owner and holder of the coupon No. 4, which has not been paid, although demanded, etc.

Up to 126, the causes of action are on other coupons.

127TH CAUSE OF ACTION.

10. It avers its corporate capacity and citizenship, the corporate existence of the township and the citizenship of defendants.

11. It sets out the act already referred to, the appointment of the trustees, the election, the issue of the bonds, and avers certain matters which it claims entitles it to tender back the bonds and recover the money actually paid, to-wit: $12,420, with interest from date of payment, the said money, or its avails, being still in the hands and possession of the township.

ANSWER.

The defendant answers this petition strictly in accordance with the practice in Ohio, admitting:

3. The passage of the act referred to in No. 3, above.

5. So much of No. 5, above, as alleges the appointment of the board of five trustees, the taking of the vote, that the trustees of the railroad, not of the township, prepared and issued the bonds, and the same were sold to plaintiff, and that the coupons have not been paid.

And it denies each and every other allegation in the petition contained.

This answer put in issue every fact alleged in the petition not specifically admitted.

Section 5070, Revised Statutes, Ohio.
Bradford vs. Andrews, 20 O. S. 221.

And there is no other way to put in issue any fact in the petition, except by denying its truth. There is not in Ohio any other pleading than the petition, answer and demurrer, in civil actions. We have no such thing as a plea of any kind: in bar, abatement or any other form.

This answer, therefore, without any reference now to the special matter, to which the demurrers were interposed, put in issue.

1. THE CORPORATE EXISTENCE OF THE COMPLAINANT.

There is no allegation in the petition that the defendant dealt with them as a corporation, or was in

manner estopped to deny the plaintiff's right to sue in the name of The Milford Five Cent Savings Institution. For aught that appears, that might be a co-partnership doing business under that name. But a co-partnership organized and doing business out of the state of Ohio, cannot sue in the firm name in Ohio. At common law, the action could not be maintained in the firm name. It is only by virtue of the statute of Ohio, that such suit can be brought at all in the firm name. But that statute expressly limits the right to partnerships organized for the purpose of carrying on business in Ohio, or holding property therein.

Section 5011, Revised Statutes Ohio.
Smith vs. Hoover, 39 O. S. 256.

A company suing under this statute, must bring itself within its provisions.

Haskins vs. Alcott, 13 O. S. 210.

The plaintiff alleged that it was a corporation. The answer denies that. It was incumbent, therefore, on the plaintiff to make proof of that fact, without reference to the questions presented by the demurrers.

2. It Denies the Citizenship of the Plaintiff.

It is not neeessary to cite authorities in support of the proposition that the jurisdiction of the Court must be shown in the petition, the jurisdiction depending on the citizenship of the parties. It is properly enough alleged; but it is denied. It is put in issue by the answer.

I do not overlook the general rule that in equity

the jurisdiction on the ground of citizenship of the defendant can only be questioned by a plea in abatement, and that rule in suits in equity, applies to the Federal Courts everywhere. But in actions at law, where the State practice is adopted, it is impossible. We have no such plea. Our answer denying the jurisdiction averment of the petition is the equivalent of a plea.

"That the plaintiff is not a citizen of the State of New Hampshire, and not a corporation organized under the laws of that State."

3. IT PUTS IN ISSUE ANOTHER VERY MATERIAL ALLEGATION OF THE PETITION.

The Township has no authorty under the general laws of the state to issue these bonds, or any bonds.

Section 1376, revised statutes, Ohio, enumerates the power of civil Townships under the general law.

The allegation of the petition is specific that the bonds were issued under this act of the Legislature, and if the power was not conferred by that act it was not conferred at all. But to exercise it under that law the terms thereof must be complied with, and an allegation of compliance is necessary to plaintiff's suit.

The act under consideration contains the following clause:

"Section 1. Be it enacted by the General Assembly of the State of Ohio, that whenever in any Township which by the Federal census of 1870 had, and which by any subsequent Federal census may have, a population of one thousand five hundred and ninety-nine the Township trustees thereof shall, on the peti-

tion of fifty resident tax payers of such Township, pass a resolution declaring it to be essential to the interests of such Township that a line of railway should be constructed on the line to be designated in said petition, and said railway shall be named in said resolution and the termini thereof shall be designated therein, and not to exceed seven miles in length, it shall be lawful for a Board of Trustees appointed as herein provided, and they are hereby authorized to borrow as a fund for that purpose not to exceed the sum of twenty thousand dollars, and to issue bonds therefor in the name of said township, bearing interest at the rate not to exceed six per centum, payable semi-annually, said bonds to be payable at such times and places and in such sums as shall be deemed best by said Board."

The petition alleges, "That immediately after the passage of said acts the electors of said township, which was such a township as such act describes, in strict compliance with the provisions of the same, did avail themselves of the provisions of said act, and by them such steps and proceedings were had and taken in said township as are required by the terms of said act as aforesaid."

This is all denied by the answer, and was an essential allegation and under the denial required proof, and a failure to make that proof would be fatal.

See Hopple vs. Brown Twp., 13, O. S. 133.

There were, therefore, issues to be tried by the Court, independently of the decision of the demurrers, and the sustaining of the demurrers did not by any means dispose of the case or authorize a final judgment.

There being no bill of exceptions in the case, and final judgment having been rendered, the presumption

is that on the issues thus presented proper proof was submitted by the plaintiff.

There was no demurrer to the first defense in the answer, and it stood, presenting the issues already mentioned, as well as the denial of all the allegations in the 4th, 6th, 7th, 8th and 9th allegations as contained in the paragraphs above, giving the contents of said petition, all of which were put in issue by the answer. Every one of these required proof under the answer.

It cannot be claimed, therefore, that the only questions in the case were those contained in the certificate of division, or that their determination settles the entire case one way or the other.

It was necessary to make proof, and among other things under the denial in the answer, to produce his coupons, and thus make proof of ownership and amount due.

There was also in the case the 127th cause of action, which was an action to recover back the money claimed to have been paid to these railroad trustees, in which it was alleged that the township, by its agents for the purposes contemplated by the act, and to build a line of railway for the township, borrowed and secured from the plaintiff on 13 of July, 1880, $12,420, for which they issued the bonds and thereby pledged the faith of the township. That the bonds were in form and substance negotiable by delivery, and that the plaintiff received them in good faith, etc.

That the money thus borrowed passed into the possession of the defendants and was received by them from the plaintiff; and they now and ever since

have retained said moneys or their equivalent in value. That they constructed the railroad with the money, that the township now owns the same, that the Trustees of the township made levies for the years 1880, 1881, 1883, to provide a sinking fund, etc., all with the acquiescence and without protest from the tax payers, and now tenders back the bonds, and prays judgment for the whole $12,420 and interest from July 13, 1880.

Every such allegation is denied by the answer. The first defense puts every such allegation in issue, and that issue remained to be tried in the case after the demurrers were disposed of and the division occurred which has been certified. These defenses demurred to were as well to the 127th cause of action, as to the others.

Of course, the demurrers were disposed of before the Judgment was entered, and the division of opinion which is certified occurred on disposing of the demurrers. That disposition of the demurrers left this cause of action to be tried, upon the denial in the first defense in the answer.

It makes no difference how it was disposed of afterwards. It was left in the case to be tried, and that the plaintiff after he had the opinion of the Court and the judgment rendered in accordance with the opinion of the presiding Judge, came into court and withdrew that cause of action, does not affect the status of the case at the time the division of opinion occurred.

It was an attempt, of course, to deprive the defendant of the right to prosecute the writ of error, on the ground that the amount conferred jurisdiction on this Court. But it was left in the case for final disposition

after the division was announced as the the result of the Court's deliberations.

It was finally disposed of by withdrawing it. For the purposes of this case the result is the same as if it had been tried upon the issue presented and final judgment entered on it. The rights of the defendant ought not to be defeated by such a proceeding as that. The action was for $12,420 and the decision of the demurrers left it such. The jurisdiction is now sought to be defeated by allowing this to be withdrawn.

This certificate, therefore, does not send up the whole case to the Supreme Court, in any sense as within the decisions of this Court prohibiting that from being done.

III.

There were demurrers to the 2nd and 6th defenses, and these were overruled by the Court, and are not contained in the questions upon which the Court divided, and are not in any manner involved in the questions now presented by this record. Yet they were necessarily adjudicated and passed on by the Court.

Under our practice a demurrer does not dispose of a case. The right of amendment after demurrer is granted in very broad terms. *Secs. 5113, 5114, 5116, Revised Statutes, Ohio.*

In the course of the hearing there were three questions argued to the Court upon which they did divide, and the determination of them simply amounted to

this: If the demurrers were sustained, then the plaintiff was put to its proof on the other issues presented by the pleadings. If it sustained the allegations, which were denied by proof, it was entitled to judgment.

But if these demurrers, or any one of them, were overruled, then the plaintiff would be put to his reply, and might deny the allegations, or by reply plead any matter of waiver, or estoppel, or other matter in bar of our right to rely on the defenses made, as to the causes of action on the coupons; or without reply it would leave the 127th cause of action to be tried on the issues presented by it and the answer denying it, unaffected by the decision on the validity of the bonds.

One defense alleged certain facts, not appearing on the face of the statute, which renders the act void, as in conflict with the Constitution of the State. Our right to allege these facts *de hors* the Statute, we do not discuss on this motion, but will support it at the proper time.

The unconstitutionality of the Statute was averred also in general terms.

This question the Court could not agree upon. Its decision did not entitle the plaintiff to a judgment, but it arose as an essential question in the case.

Another question arose under the averment of the petition, its denial in the answer, and the allegations of the 7th defense, viz: whether the case of Walker vs. Cincinnati, so held such bonds to be valid, as entitled the plaintiff to buy them relying upon the decision, and whether a new rule afterwards laid down by the Court, so affected the plaintiffs as to in-

validate the bonds, as legal obligations in the plaintiff's hands, under the rules established by this Court. Or, on the other hand, whether the law was at all governed by the principle of the Walker case, but by the case of Taylor vs. Commissioners of Ross County, 23 O. S. Reports 22, and other cases in the Supreme Court. One of the very acts in question having been declared unconstitutional by the Supreme Court of Ohio, in Wyscaver vs. Atkinson, 35 Ohio State, page 80, and Counterman vs. Dublin Twp., 38 O. S., 515, being the very act in question.

The Court again divided, the determination of this question either way did not decide the case, necessarily, because its decision in plaintiff's favor still left it to prove the other allegations necessary to a recovery.

If any of these demurrers were overruled, it left the plaintiff below the remedy of replying and putting the facts alleged in issue. Any action of the Court on the demurrer, was not final as to any question in the case. Matter in estoppel, waiver, ratification or bar, could be pleaded by reply, if the demurrer was overruled.

The criticism on the manner in which these questions are submitted, goes to technical accurracy of their form, rather than to their merits. They probably are inartistic. But Courts are looking less for technical reasons for defeating jurisdiction, and, more to the real issues presented, and the means of doing justice between parties.

Here is an action on some bonds, issued, it is claimed, in clear violation of the Constitution of the State,

and imposed as a burden on the taxpayers, in contravention of law.

Three questions are presented:

1. Was the law unconstitutional?

2. Did the State Court, after sustaining such law, and after these bonds were sold, change the adjudications from their validity to their invalidity?

3. Did the mandamus case set up in the answer, bring the parties within the rule established by this Court in Louis vs. Brown Township, 109 U. S., 162.

However inaccurately the counsel who prepared the certificate may have written them, the questions are purely legal questions, material to the case, and a division of opinion upon them occurred.

If any one of them is properly certified, the Court will examine it, and this motion to dismiss cannot prevail.

One of the counsel, filing briefs herein, has taken the trouble to repeat, substantially, that part of the opinion of Mr. Justice Gray, of this Court, in Jewell vs. Knight, 123, U. S., 426, which contains the very complete citation of authorities in support of the propositions therein announced, and apparently without seeing the distinction between that case and this.

This case may be stated this way: The petition sets up the special statute under which the bonds were issued, alleges compliance with its terms preliminary to the issue of the bonds, the sale to the plaintiff, its corporate capacity and citizenship, its advancement of $12,000 in good faith, in the full belief of its

validity, and then avers as part of its case that the act was in harmony with the constitution, as declared in Walker vs. Cincinnati, 21, Ohio State reports, and that it is now the owner and holder of the coupons. (See pages 6 and 7, printed record.)

The answer, in addition to matters already stated, and other allegations, put in issue by the general denial, specially denies the legal allegation as to the effect of the decisions of the Supreme Court, which denial is as good certainly, as the allegation of the petition. The answer avers that this legislation and similar acts have been declared unconstitutional by our courts by uniform decision.

A question arose as to whether the law was unconstitutional. Purely a question of law.

Counsel who prepared the petition below, says: "That is a very broad and general question," and asks, "which one of the many sections or articles it conflicts with," and reminds the Court that it will have to examine the whole constitution and the whole act.

Even if that was true, it would, nevertheless, leave the question purely one of law, and one that the plaintiff in error has the right to a determination of.

It would hardly be necessary for the Court, however, to go beyond this in that matter. The Supreme Court of Ohio, has decided this act to be in conflict with Sec. 6, Article 8, of the Constitution of Ohio. The Circuit Court thought that these decisions were not conclusive on the Federal Court, but the question was open for its independent judgment, and its presiding judge held that the law was not in conflict with that constitution; in which opinion the resident

judge did not concur. It is purely a question of law. Its determination against us, drove the plaintiff to his proof on the necessary allegations of its petition. Its determination in our favor, would have driven the plaintiff to a reply, putting them in issue, or to his 127th cause of action, for the recovery back of the money, the allegations of which, entitling such recovery, being denied by the answer.

Its determination against us by the divided Court, led plaintiff below to ask a withdrawal of his 127th cause of action, after the certificate of division, so as to attempt to defeat our right to have the question reviewed. We can only repeat that when the division occurred, that was still left in the case, with the facts denied, for determination.

The Court might well have considered the special defenses insufficient as against the 127th cause of action, which was met sufficiently only by the denial in the first defense. It was shrewd on the part of counsel, and its effect not being apparent either to Court or opposing counsel may be successful, but we are reluctant to believe it.

So with the second question. The plaintiff below, in his petition, relied upon the case of Walker vs. Cincinnati, 21 O. S., and pleaded it. We relied upon Taylor vs. The Commissioners, 23 O. S., and pleaded it. It was wholly unnecessary to plead specially either the statutes or the decisions of the State in which the Circuit Court was held, but the answer was as good as the petition, and the true effect is this, that the plaintiff alleged that the law of Ohio at the time the bonds were issued, was that they were issued

under valid law. A conclusion of law it is true, not at all a fact, but it was in issue and denied, an unnecessary denial, because its determination was purely a matter of law for the Court.

What difference does it make that the Court must examine the law of Ohio to determine it? If the question arose under the Constitution of the U. S., or decisions of the Federal Courts, we would not be required to point out what particular decision or all the decisions affecting the question. The question is one of law. What the law is the Court will determine. It would not be confined to particular decisions, if they were pointed out.

Counsel seem to think because there are 64 volumes of Ohio Reports, that the Court will not address itself to the task of ascertaining what the law of Ohio is on a disputed legal proposition.

The presiding judge thought the case was clearly within the principle of Walker against Cincinnati, although the Supreme Court of Ohio, in Wyscaver vs. Atkinson, 37 Ohio State, decided that it was not, (see page 97 of opinion,) but that it was clearly within the principle of Taylor vs. Commissioners, 23 O. S., 22. The resident judge agreed with the Supreme Court of the State, the closing paragraph of whose opinion is as follows:

"In conclusion I may say, that it has been sought to maintain the validity of the statute under consideration upon the principles decided in the case of Walker vs. Cincinnati, 21 Ohio St. 14. But as we have shown the scheme of this statute to be essentially different from the one considered in that case, it is not necessary for us to review the doctrines of that decision. On the other hand, we conceive the prin-

ciples involved in this case to be substantially similar to those in the case of Taylor vs. Commissioners of Ross County, 23 Ohio St., 22, in which the statute was held to be unconstitutional, for reasons entirely satisfactory to the Court, then and now. We are content to follow the doctrine of the latter case in disposing of the case before us. And while we regret the necessity of differing with the legislative department of the government in respect to the constitutionality of one of their enactments, we will express the hope that in the future, as in the past, but few occasions may arise for such difference."

The differences of opinion on these two questions were certified, perhaps inartistically, but clearly, so that no ambiguity arises as to what is meant.

It would be grossly improper to point out in the certificate of division the cases in Ohio on the subject, or attempt to give copies of the decisions *pro* and *con*.

It is a question of law, not only whether these were conflicting decisions, but the legal effect of the state of the law, at the times the bonds were issued, under the rules of decision adopted by this court, where by subsequent decision and after rights have accrued the decisions of the state tribunals are reversed.

The Supreme Court of Ohio has expressly decided that there is no conflict between the decisions on this question, that this legislation is within the principles of the *Taylor Case* and prohibited, and not within the principle of the *Walker Case* and permitted. The presiding Judge of the Circuit Court disagreed with the Supreme Court and thought that there was a conflict, and this case was governed by the Walker case; and hence that case must be overruled by the Wyscaver case and the Counterman case, while the resident Judge agreed with the State Supreme Court. They

certified this division in the only form it could be certified in and present the question properly.

On the third question certified, the criticism of the counsel is wholly unwarranted. On pages 17, 18 and 19 of the brief filed by Mr. Lee, it is sought to make this question embrace more than the two suits specially pleaded in bar in the answer. Certainly the Court will have no difficulty in disposing of such an objection as that.

The fact that analagous law questions were decided in other cases between other parties, of course, could not be pleaded as a bar to plaintiff's action, and the certificate only relates to the actions pleaded in bar. It so expressly states. Now we would have been better satisfied if the certificate confined the question to the mandamus suit. As we are now advised and under recent decisions, reversing the Circuit Court's, we do not believe the Counterman case is a bar, but do believe the Mandamus case is.

But the question is purely a legal one as to what effect these former adjudications have, and they are certified in the only way possible.

It has been held in this Court, in Louis vs. The Trustees of Brown Township, 109 U. S. 162, that

"2. A judgment in a Mandamus case, as to the invalidity of certain bonds, is conclusive in a subsequent action as to the questions decided, on the parties and their privies."

This was a controversy arising out of Hopple vs. Brown Township, 13 O. S. 311, already cited. where the validity of the bonds was tried in the Mandamus proceeding.

In our answer we set out the proceedings in Mandamus between exactly the same parties, on precisely the same bonds now before the Court, and attach a copy of the record.

Now the question before the Court was, does that record show such an adjudication as in law bars the present proceeding on the bonds. Does it come within the principle decided in the case of Louis vs. Brown Township?

The presiding Judge thought not, but his associate differed and they certified the question. Counsel who drafted the certificate for the Judges might have done it better, but the Court is advised as to the question, and it is distinct and clear enough.

We had before us when the certificate was drafted The certificate of division in the case of Whitbeck vs. The Bank, reported in 127 U. S. 193, and endeavored to follow the form there adopted as nearly as possible. The report of the case does not give the certificate, but we have the printed record now before us, and certainly every objection that is urged against the certificate in the present case could be urged with equal force there, and yet that case was heard by this Court and decided, although the amount involved there was less than $5,000, being in fact $3,967.55.

If the counsel has been misled in preparing the certificate, it was in following the precedent established by that and other cases which went through this Court to final judgment.

In that case the Court found the facts and stated them and then presented the questions thus:

"And on the foregoing facts there occurred on the hearing of said cause the following questions of law upon which the opinion of the said Judges were opposed:

1. Whether the valuation for taxation, as aforesaid, of the shares of the complainant by the State Board of Equalization for the shares of incorporated banks at sixty-five per centum of their true value, was a discrimination prohibited by the act of Congress.

2. Whether the said testimony offered by said defendant and excluded by the Court was admissable for the purposes stated.

3. Whether the rule for the valuation for taxation of other moneyed capital in the hands of individual citizens of said city and county where said complainant bank is located, was the the sole measure for the valuation of the shares of National banks located therein, or might the State Board of Equalization for the shares of incorporated banks, lawfully value such shares at a rate not exceeding the average rate at which other moneyed capital in the hands of individual citizens of said State throughout said State is valued for taxation.

4. Whether the taxation of National bank shares in the State of Ohio, in the year 1885, without permitting the shareholder to deduct from the assessed value of his shares the amount of his *bona fide* indebtedness existing on the Wednesday next preceeding the second Monday in May, 1885, and on the day preceeding the second Monday in April, 1885, is a discrimination forbidden by the act of Congress, the said share-holders not having deducted said *bona fide* indebtedness from any credits owned by them at either of said dates.

5. Whether the demand for such deduction, first made on the 17th. day of Decemben, 1885, was sufficiently early to entitle complainants shareholders thereto."

The determination of those questions came very much nearer disposing of the whole case than in the one at bar.

The demurrers admitted the facts pleaded and that was certainly equivalent to a finding of such facts by the Court.

We submit therefore, that this case does not come within any of the prohibited classes stated in the opinion of this Court in Jewell vs. Knight.

1. They are questions of law only, and not questions of fact or mixed law and fact.

2. The whole case is not sent up on the certifiate.

3. Nor is the whole case split up in the form of several questions. It is not at all like the case of Webster vs. Cooper, 10 Howard 54. Nor at all like Jewell vs. Knight, where the question whether the sale was fraudulent was dependent upon the testimony and all the facts proved, or, as was stated, whether "*under the circumstances*" the sale was fraudulent.

The rule in Waterville vs. Van Slyke, 116 U. S. 699 clearly justifies the present certificate, and the questions submitted there and those submitted in the present case as well illustrate the rule as possible.

If the Court will compare those questions with ours we venture the opinion that none of the criticisms of Mr. Justice Miller, to the certificate in that case will be found applicable to the present case.

Without taking space to reprint any part of the opinion here we invite a test under the rule there laid down.

It was expressly decided in the case last cited that more than one question might be embraced in the certificate, if more than one occurs, and it was not intended in the case of California, &c. vs. Molitor, 113 U. S. 615, to hold that but a single question could be certified in any case, as one of the counsel citing the case seems to infer, by the use of italics in quoting from the opinion in that case.

The opinion in those three cases: Jewell vs. Knight, Waterville vs. Van Dyck and California, &c. vs. Mollitor give us a rule that we are willing to be tested by.

In Williamsport National Bank vs. Knapp, 119 U. S. 357, it is held that

"Each question certified must be one of law and not of fact, nor of mixed law and fact, and that it must be a distinct point or proposition clearly stated, and not the whole case, nor the question, whether upon the evidence, the judgment should be for one party or the other."

Whether a certain act of the legislature is in violation of the Constitution, is certainly a distinct clearly stated proposition of law.

Whether such acts were held to be constitutional at a given period, although afterwards held by the State Courts to be unconstitutional, is certainly a distinct, clearly stated, legal proposition.

Whether a certain suit between the same parties, an exemplified copy of which is attached to the answer, is *res judicata* on any of the issues involved in the present suit, is purely a question of law.

And even if any of these questions are bad, if one of them is sufficiently certified it gives the Court jurisdiction. Such was the practice in the Northway case and Enfield vs. Jordan. Tested by comparison with the questions in Bank vs. Railroad, 122 United States 21–23, our certificate is sufficient; or by those in Williamsport Bank vs. Knapp *ante* our certificate is good.

In The Town of Enfield vs. Jordan, 119 U. S. 680, after a finding of facts by the Court there was a certificate of division upon these questions:

1. Whether the incorporated town of Enfield had power to vote and issue the bonds and coupons in controversy under any of the provisions of the acts above specified.

2. More particularly whether said Town had power under the tenth section of the amendment of the Railway Company's charter, approved February 24, 1869.

3. Whether said town was not estopped from further defense by the litigation theretofore had between it and plaintiff.

5. In case there was power in the Town, under said laws, to vote and issue said bonds and coupons, whether one of said bonds and the coupons thereto belonging were void in the hands of plaintiff in this suit by reason of one, Post, having litigated it in the State Court of Illinois.

This Court answers three of these questions, criticising the last one, but nevertheless answering it, and refusing to answer the third because it was not shown that the same issues were involved in the former suit

as in the one certified. As we have already remarked it is unnecessary in this case for any finding of facts, for the demurrer admits whatever facts are properly pleaded. But the questions are purely legal ones, the validity of Statutes; whether the Statute had been held valid when the bonds were issued, and the decision afterward changed; the legal effect of an authenticated record on the rights of the parties.

In U. S. vs. Northway, 120 U. S. 327, the Court answers all of the questions certified except the first, which was held to be too vague and general. Tested by the answered questions we submit that our certificate is good.

These questions arising at the same time and involving a consideration of the pleadings, as to the matters embraced in the defenses demurred to are also practically within the rule of the United States vs. Chicago, 7 Howard, 185. It would be useless to pursue an examination of the great number of authorities in this Court.

If the Court or Counsel have been misled in the manner of preparing this certificate, we submit that it is chargeable to the number of precedents found in reported cases, apparently justifying it.

Counsel for defendant in error, after bringing a suit for over $12,000 in one of the causes of action, discover that, as the Judges differ upon the questions involved, they can get a judgment for the coupons, leaving the principle to be fought out hereafter, and if the jurisdiction of this Court can be defeated they are so much ahead. So they dismiss or withdraw

their cause of action for the whole amount, which was left undisposed of at the time the difference on the questions certified occurred.

Suit on the bonds will have to occur sometime, and this Court will not certainly strain a point to bring about this result, that the Federal Courts will differ with the State Courts to the extent of requiring payment of the interest on the bonds, but will agree with them in defeating the payment of the principal because the latter amount gives this court jurisdiction while the former does not.

The three briefs filed by Counsel supporting the motion are alike in one respect. In none of them is there the slightest reference to the effect of the first defense in the answer, nor to the 127th cause of action in the petition. They ignore those two important matters in the case entirely.

MR. BROWN'S BRIEF.

Page 4. The first question is not in reality two questions. Whether the act is in conflict with the Constitution and therefore void, is a single question. If it is in conflict with the Constitution the act is necesssarily void.

But bonds issued under an unconstitutional law are not necessarily uncollectible. The principles of estoppel, for instance, apply where the proceedings are questioned on the ground of the unconstitutionality of the Statute under which they are had, as well as where they are sought to be impeached on other grounds.

State ex rel vs. Mitchell, 31 O. S. 592.
Tone vs. Columbus, 39 O. S. 281.

Daniels vs. Tearney, 102 U. S. 415.
Hitchcock vs. Galveston, 96 U. S. 341.

If the Court had decided the law unconstitutional the Plaintiffs below instead of dismissing their 127th cause of action would have attempted to sustain their suit under the allegations of that cause of action.

If there are any facts alleged in the answer necessary to the determination of this question they are admitted, and not disputed facts, and fully equivalent to a finding of facts by the Court. It would be useless for the Court to repeat the facts in the finding.

The act applies only to Townships having a population of 1599. The petition necessarily alleged Dublin Township to be such a Township, and the answer reaffirmed it.

Page 5. The second question seems to Counsel very complex. To us it seems quite simple.

In Douglas vs. Pike Co., 101 U. S., this Court decided that a decision of the Missouri Supreme Court, holding certain acts valid was in force at the time certain bonds were issued and sold; that subsequently, in 67 Mo., the Supreme Court decided similar acts unconstitutional and invalid; that in an action on bonds issued between the two decisions the Federal Courts would adhere to the first decision so far as to give validity to the bonds.

As already shown the Ohio Supreme Court has decided that there never was any decision that this kind of legislation was valid; that it never was governed by the principle in the Walker case, but was within the Taylor case. Well, the Circuit Judge differs with the State Supreme Court while his associate agrees

with it. These two cases are pleaded in the petition and answer, if that aids it in any way, and the point is certified and in the only possible way to present it as a naked legal proposition.

Counsel says, "whether such decision as that alleged in the the petition was made before or after the passage of the act, or prior to the sale and negotiation of the bonds, are questions of fact to be proven by common law evidence.

That is not so, but if so, then it must be pleaded, as it is, and the answer puts it in issue.

The petition alleges the date of issue and sale of bonds, the date of the passage of the act, and that it "had been *theretofore* determined by the Supreme Court in Walker vs. Cincinnati," &c., that the law was constitutional. (Page 7, Record.)

The answer denies that explicitly (P. 26,) and avers that such legislation had been declared unconstitutional by Taylor vs. Commissioners, decided after the Walker case and before the passage of the act. (Pages 28 and 29, Record.)

[A comma should follow the word petition in the fourth line of the second question certified, page 39, printed record.]

MR. LEE'S BRIEF.

The only point requiring further notice than has already been given to the argument generally is the statement on page seven.

"The determination of either one of these questions against the defendant in error disposes of the whole case against it."

We have already shown that this is not and cannot be so.

If the law is unconstitutional, he has a right nevertheless to rely upon former adjudications, if there are any, bringing the case within the principle of the Douglas vs. Pike County case, 101 U. S., or he has the right to set up matters in estoppel, as in the cases above mentioned, or he has the right to claim that, although the bonds are invalid, he can recover the money back under the 127th cause of action, if the facts therein pleaded are found by the Court to be true.

If the first and second questions were both decided against it, the other questions would nevertheless remain. Counsel seem to think that if the Court decides one way they can abandon their case as made, while a decision the other way would entitle them to insist on their case as fully set out in their petition.

In other words by a reply, the proper mode in Ohio, the plaintiff could deny every allegation in the answer, and plead any new matter of estoppel, waiver, acquiescence, and any fact which would meet the answer.

Revised Statutes Ohio, Section 5070:

"The answer shall contain a general or specific denial of each material allegation of the petition controverted by the defendant.

2. A statement of any new matter constituting a defense, counter-claim or set-off in ordinary and concise language.

Section 5079. When the answer contains new matter the plaintiff may reply to such new matter, denying, generally or specifically each allegation controverted by him, and he may also allege in ordinary and concise language, any new matter not inconsistent with the petition, constituting an answer to such new matter in the answer."

With this suggestion to the Court we close this argument, already too long.

These answers to which the demurrers were filed were answers to the whole petition as it then stood, including the 127th cause of action. The Court was required to determine whether the answer was good to that part of the petition as well as the rest. It might well say: Although the law is unconstitutional, and the plaintiff is not protected by any previous decision that brings him within the Douglas vs. Pike Co. case, and the mandamus suit may be a bar to an action on the bonds as valid instruments. Yet we will hold that if the facts alleged in the 127th cause of action are true, the plaintiff may recover. The questions arising on the demurrer would necessarily be involved in the case, but the plaintiff has changed the case to which the answer was filed and the case as it existed when the demurrers were sustained. Is not this of itself a sufficient answer to any claim that the questions certified, disposed of the entire case.

Is not the result and effect precisely the same as if, after the division of opinion, the case went to trial on its merits, and the plaintiff proved its corporate character and right to sue as such, its citizenship, its ownership of the bonds and the amount due, that the necessary steps were taken under the act of the Legislature by the Township authorities to authorize the vote and the bonds, that the petition of the fifty resident tax payers was filed, the resolution passed declaring the necessity of the railroad, fixing its termini, etc., and the passage of the resolution authorizing the issue and submitting the question to vote, all of which is denied in the answer, and the plaintiff failed

to prove the allegation of the 127th cause of action, and that cause of action was therefore dismissed?

Is not that precisely the effect of what was done so far as this certificate of division is concerned?

JOHN H. DOYLE,
Of Counsel for Plaintiff in Error.

Supreme Court U. S.
FILED.
OCT 17 1888
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States.

Dublin Township of Mercer County, Ohio,

vs.

The Milford Five Cent Savings Institution.

} In Error.

Brief for Defendant in Error on Motion to Dismiss.

— BY —

J. C. LEE,
Of Counsel.

J. Markee, Pr., Toledo, O.

Dublin Township,
Plaintiff in Error.

vs.

The Milford Five Cent Savings Institution,
Defendant in Error.

Supreme Court of United States.

Writ of Error.

OCTOBER TERM, 1888.

Motion to Dismiss for Want of Jurisdiction.

BRIEF FOR DEFENDANT IN ERROR.

The writ of error is sued out to the Circuit Court of the Western Division of the Northern District of Ohio, to secure review and reversal of a judgment rendered at the June term, 1887, in the sum of three thousand eight hundred and nineteen and fifteen one hundredths dollars [$3,819 15-100] in favor of the Defendant in Error and against the Plaintiff in Error.

The jurisdiction of this Court rests wholly upon a certificate of division between the Circuit and District Judges. Judgment was rendered in accordance with the opinion of the Circuit Judge.

As the amount in question is insufficient to confer jurisdiction of itself the writ must be dismissed

unless the certificate of division be such as to confer jurisdiction.

The action was begun in the Circuit Court by the Defendant in Error to recover judgment on 126 several coupons clipped from bonds issued by the Railroad Trustees of Dublin Township, Mercer County, Ohio.

These bonds with their coupons were issued and sold to Plaintiff by five trustees, resident of that township and appointed pursuant to the provisions of an act of April 10th, 1880, by the Legislature of Ohio.

That act is set out in substance in the Plaintiff's Petition in which also are averments of compliance in full with the terms of the Act and the purchase by, and the ownership of, the Plaintiff of such bonds and coupons.

The Plaintiff in its Petition sought and obtained judgment for the amount of the coupons past due at the time of bringing the action.

This action was one at law, and the only relief sought and obtained was a judgment at law against the township, which is a municipal or political body corporate. The original Petition was amended, the amended Petition embracing all the features of the original Petition. To that amended Petition the township, and the individuals who were parties Defendant with it, made answer.

In their first defense the Defendants admitted the passage of the act, the appointment of the board of five trustees, the taking of the vote of the electors of the township, that a majority were in favor of the construction of the Railroad, and that the board of trustees of the Railroad properly issued and negotiated to Plaintiff the bonds and coupons set up in the Petition, and that the coupons and the principal of the bonds have not been paid, and then deny every other allegation.

The second defense simply alleges the death of one of the Railroad trustees prior to the commencement of the action, and that no claim was ever presented by the Plaintiff against his estate for allowance.

The third defense alleges that the act of the legislature under which the bonds were issued was in conflict with the Constitution of Ohio, and then proceeds to give an extended enumeration of reasons why such act is so unconstitutional, and that defense winds up with a denial of the allegations of the petition, to the effect that the act or any similar Act was ever held valid by the Supreme Court of Ohio, or that the Act was similar in any manner to the Act involved in the case of Walker vs. Cincinnati, 21st. Ohio State Reports. We here remark in passing that the sum total of this defense is an allegation of the unconstitutionality of the act under which the bonds were issued

The fourth defense pleads the record in a certain cause begun in the Common Pleas of Mercer County, Ohio, by Jacob Counterman and others to secure perpetual injunction restraining the trustees of that township of Dublin, and the auditor and the treasurer of the County of Mercer, from levying or collecting taxes upon the property of the township to pay these bonds, on the ground of the illegality and invalid character of the bonds, because of the unconstitutionality of the act under which they were issued.

That this defense also alleges that said cause went through the District Court to the Supreme Court of Ohio, and by that court injunction was made perpetual as appears in the records of the case and as reported at page 515 of the 38th, Ohio State Reports.

This defense also avers that owing to that final decree the property of such of the tax payers of such township as availed themselves of the benefits of that action will be exempt thereafter from any taxation to pay these bonds and coupons.

The fifth defense pleads the record in a certain other civil action or proceeding wherein the Defendant in Error here, as the Relator in behalf of the State of Ohio, sought by mandamus to compel the trustees of that township and the Auditor of the County to levy and assess against the property of that township an amount sufficient

to pay these coupons, or such of them as were then past due.

In that case the alternative writ of mandamus was allowed, to which the trustees of the township and the auditor made answer, alleging the unconstitutionality of the act under which the bonds were issued, and showing that on final hearing, the Circuit Court to which said cause was properly carried from the Common Pleas, denied and disallowed the peremptory writ of mandamus.

The judgment in this case is alleged to be unreversed and in full force, and by inference we may understand that it is set up as a bar in this case, although not formally so done.

The sixth defense states that the five Railroad trustees acted in good faith in a public capacity and not for their private interests, and in the issuing and sale of said bonds, they so acted in a public capacity and should not personally or individually be holden for the amount of said coupons or bonds.

The seventh defense starts out by alleging that the Defendants reiterate and reaver all of the allegations of the third defense, and further say that the 6th section of article 8 of the Constitution of Ohio forbade this legislation under which these bonds were issued, and then proceeds

to enumerate various reasons and considerations tending to show that this legislation and the proceedings of the Railroad trustees under it, as well as the Plaintiff, was a scheme condemned by the provisions of sections six aforesaid.

And also setting forth that the Supreme Court of Ohio in the case of Taylor vs. the Commissioners of Ross County, 23rd Ohio State Reports, page 22, declared similar and concurrent legislation in conflict with the Constitution of Ohio, and that it so did after the same Court had rendered the decision it did in Walker vs. Cincinnati, 21st Ohio State Reports, page 15.

To the last six defenses the Plaintiff separately demurred, and the Court overruled the demurrer as to the second and sixth defenses, sustaining the demurrer as to the 3rd. 4th, 5th and 7th defenses.

The Plaintiff not wishing to reply to the second and sixth defense judgment passed against the Plaintiff as to those defenses, and the Defendants not wishing to amend their answer, further judgment passed in favor of the Plaintiff and against the Defendants on the 3rd. 4th, 5th and 7th defenses.

It is easy to see that although these defenses are four in number to which the demurrers were sustained, they in fact present but two defenses in kind.

The third and seventh are in kind and effect one and the same, namely; that the Act under which the bonds were issued was unconstitutional and void, and the bonds therefore void.

And the fourth and fifth defenses are the same in kind and effect, namely; that there has been an adjudication and estoppel arising out of such adjudication as to these bonds, in favor of the Plaintiff in Error and against the Defendant in Error.

The determination of either one of these questions against the Defendant in Error disposes of the whole case against it.

In the determination of the Constitutional question not only did the Circuit Court look into the alleged unconstitutionality of the Act of April 10, 1880, under which the bonds issued, but it did also look into the import of the decision of the Supreme Court of Ohio, in Walker vs. Cincinnati, in the 21st Ohio State Reports.

And in such investigation it found that the legislation of April 10th, 1880, was warranted by and in harmony with the holding of the Supreme Court of Ohio in the 21st Ohio State, Walker vs. Cincinnati, and that the decision in the 21st Ohio State, preceded the legislation of April 10, 1880.

By invitation of the Plaintiff in Error the Court also looked into the decision of the Supreme Court of Ohio, in the 23rd Ohio State Reports, Taylor vs. the Commissioners of Ross

County, and found that the decision there was not incongruous with the decision in the 21st Ohio State Reports, and that while the holding in the 37th and 38th Ohio State Reports was such as would make the Act of April 10, 1880, unconstitutional, yet they came after the legislation and after the issue and the sale of the bonds under that legislation, so that the rights of the Defendant in Error became fixed under the decision in the 21st Ohio State, and before those in the 37th and 38th Ohio State were made. The Court also held in accordance with the holding of this Court in that behalf that it, the Circuit Court, had a right to and would follow and uphold the holding in the 21st Ohio State Reports, rather than that in the 37th and 38th Ohio State Reports.

In passing upon the demurrers to the 4th and 5th defenses, the Circuit Court readily found that neither of the records referred to in those defenses contained an adjudication, or amounted to an estoppel as pleaded.

We now are prepared to consider the three questions contained in the certificate of division. The language of the first is, "Whether the said answer showed that the law under which the bonds sued upon were issued, was in conflict with the Constitution of the State of Ohio and therefore void."

This is a double question. Its first part is, is there a conflict with the Constitution of Ohio? and secondly, if there is a conflict is it such a one as substantially renders the Act void?

The next question, although long, has in it that which may be termed but a single proposition. In the printed copy, page 39, the punctuation is misleading. The semi-colon after the word "petition" is improper, for the punctuation there should be but a comma, and the clause that follows Petition, namely: "That such and similar legislation was constitutional and valid" is limiting or descriptive of the word decision in the second line of the question, and there should be after the word valid another comma and thus punctuated, the meaning of the question is not obscure.

Perhaps the phraseology without changing the meaning a particle would be more felicitous, if it were thus: "If this act is in fact in conflict with the Constitution of Ohio, and notwithstanding that it has since the bonds were sold, been declared unconstitutional by the court of last resort in Ohio, had there been such decisions by the State courts of Ohio prior to the passage of this act and prior to the sale of bonds issued under it, and which are set out in the petition, to the effect that such and similar legislation was constitutional and valid, as entitles the Plaintiff to recover under the decisions of the Federal Courts?"

Possibly the same meaning may be better stated thus;"Is the Plaintiff entitled under the decisions of the Federal Courts to recover in this case, notwithstanding the act under which the bonds were issued may be in fact unconstitutional, and notwithstanding this act has since the sale of the bonds been declared by the highest Court of Ohio unconstitutional, by reason of any decision or decisions of Ohio State Courts to the effect that such and similar legislation was constitutional and valid made before the enactment of the law and the sale of the bonds."

These two questions go wholly to a single defense, and they fully cover all questions arising under the defense, of unconstitutionality.

The third question is in these words: "Whether the former suits, actions and proceedings in the State courts or any of them alleged in said answer, were and are such adjudications of the question involved in this action as amount to a bar to the Plaintiffs' right to recover herein?"

This question it is plain to be seen calls upon this court to say whether the record in the case of Counterman vs. The Trustees of the Township amounts to a bar of the Plaintiff in this action, and it also calls upon this court to say whether the record in the case of Ohio Ex. Rel. the Milford Five Cent Savings Institution vs. The Trustees of Dublin Township and the Auditor of Mercer

County constitutes a bar to the Plaintiffs' right to recover in this action.

This brief analysis of the import of these three several questions shows clearly that if the court makes answer to each it answers every question arising in the case. It decides the whole case. It leaves nothing for the court below to decide. It passes completely and conclusively upon the only two questions in the case, namely; whether the Plaintiff cannot recover, on account of the invalidity of his bonds arising out of the unconstitutionality of the act under which they issue, and secondly, whether if the bonds were not invalid by reason of such unconstitutionality the Plaintiff has lost his right of action upon them, by reason of the matters and things contained in the two records referred to and set up in the 4th., and 5th., defenses?

The rule is well settled in this court that it will answer no questions certified to it in any case in which the whole case is brought before it.

This court will not answer one or more of the certified questions and leave one or more of the certified questions unanswered, provided the whole case is brought up within the limits of and by all of the certified questions. For that reason the motion to dismiss should be granted.

Each and all of these three questions are ob-

noxious to another cannon of this court which is, that each and every question so certified must contain a single point of law, unmixed with fact, and clearly stated.

As already indicated the first question asks the court to say whether the act under which the bonds were issued was in conflict with the Constitution of the State of Ohio.

That is a very broad and general question. The Constitution of Ohio is an instrument of many articles and many more sections. Which one of these many sections or articles it conflicts with, this court is left to a general perusal of the Constitution to answer.

It is true that in the 7th., defense, section six of article eight of the Constitution, is set out, *haec verba*, and it is therein alleged that the Act of April 10th, 1880, is in conflict with that section, but this question is not whether the Act of April 10th, 1880, is in conflict with that section, but it is a question whether it is in confiict with *any clause* of the 189 sections of the Constitution.

When the court shall have examined these 189 sections and all the clauses thereof, and shall have found that it is not in conflict with any of them, what would be its answer to this question? Would it say yes or no?

If the court shall find that the Statute in some part, in some of its provisions, is in conflict with some clause of some one of the 189 sections of the Constitution, it then would have to address itself to the further question, what is or should be the effect upon the Act of such repugnancy as it may find in it to the Constitution.

It will then have to say what clause or what section if any, of the Act, or whether the whole Act shall perish in the presence of the conflicting provisions of the Constitution.

Is the court ready under the authority of section 693 of the U. S. Statutes, and in accordance with the rules of interpretation thereof heretofore laid down by this court to enter upon the work involved in answering this first question? If this court refused to answer the question it did in United States vs, Northway, 120 U. S. 327, much less will it undertake to answer the general question involved in the first part of the certificate of division.

Before leaving this first question allow us to remind the court of what we should have spoken earlier in the consideration of this question.

While it is true that in defense No. 7, there is a special setting up of section 6 of article 8, of the Constitution, and a special claim that the Act of April 10th, 1880 is in conflict with that particu-

noxious to another cannon of this court which is, that each and every question so certified must contain a single point of law, unmixed with fact, and clearly stated.

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When the court shall have examined these 189 sections and all the clauses thereof, and shall have found that it is not in conflict with any of them, what would be its answer to this question? Would it say yes or no?

If the court shall find that the Statute in some part, in some of its provisions, is in conflict with some clause of some one of the 189 sections of the Constitution, it then would have to address itself to the further question, what is or should be the effect upon the Act of such repugnancy as it may find in it to the Constitution.

It will then have to say what clause or what section if any, of the Act, or whether the whole Act shall perish in the presence of the conflicting provisions of the Constitution.

Is the court ready under the authority of section 693 of the U. S. Statutes, and in accordance with the rules of interpretation thereof heretofore laid down by this court to enter upon the work involved in answering this first question? If this court refused to answer the question it did in United States vs, Northway, 120 U. S. 327, much less will it undertake to answer the general question involved in the first part of the certificate of division.

Before leaving this first question allow us to remind the court of what we should have spoken earlier in the consideration of this question.

While it is true that in defense No. 7, there is a special setting up of section 6 of article 8, of the Constitution, and a special claim that the Act of April 10th, 1880 is in conflict with that particu-

lar section, yet if your Honors will note the language of defense No. 3, it will appear that there is a *general* allegation of invalidity of these bonds, because of the unconstitutionality of the act under which they issue.

In the absence of any ~~requirement that~~ objection to that mode of pleading the invalidity of the act and of the bonds under ~~them~~ it, the court might well note such defense and act upon it, and it might well certify up the question in the form that it has certified it up, namely; Does the answer show that the law under which the bonds sued upon were issued was in conflict with the Constitution of the State of Ohio, and not whether it was or was not in conflict with section 6 of article 8 of the Constitution?

We may also suggest that this is not a question whether some particular section or parts of a section of the act of April 10th, 1880, is in conflict with section 6 of article 8 of the Constitution, or in conflict with any other clause, section or article of the Constitution, but whether the law, the act as a whole was in conflict with the Constitution of Ohio, or any part of it;

And also the further question as above stated, whether whatever conflict may or might by the court be discovered, if any, was such conflict as would render the act substantially void, and therefore leave the bonds issued under it void?

SECOND,

The second question requests an answer as to the alternative phase of the constitutional feature in the case. It in effect says, "conceding the act of April 10, 1880, to be unconstitutional and therefore void, and conceding also that the court of last resort in Ohio has so held since the purchase by Plaintiff of the bonds in question, were there or are there now such decisions of the Federal Courts as entitles the Plaintiff to recover in this action on its bonds, owing to the character of decisions of the Ohio State Courts prior to the purchase by Plaintiff of the bonds?

While this question may be termed a single one, it also may not improperly be regarded as a double question, or as two distinct questions. It is however immaterial whether the question is double or whether it is single. By the question this court is required to look into and determine two things.

I. Whether there were in existence at the time Plaintiff purchased these bonds a decision or decisions of the State Courts of Ohio that fairly warranted the Plaintiff in relying upon the constitutionality of the act of April 10th, 1880.

II. The further question whether the import of the Federal Court decisions is such as permits or requires the United States Circuit Court to give

the Plaintiff the benefit of such reliance, and hence to hold his bond valid.

These two duties are imposed upon this court by this question. Perhaps that statement should be modified. Perhaps it ought to be conceded that if this court should find that there were no decisions of the State Court warranting Plaintiff in regarding the act as constitutional, this court would not be required to consider its own decisions, or that of other Federal Courts to see whether they warranted the Circuit Court in sustaining the *bona fides* of the purchase under the circumstances.

In any event however, this court must in the hearing of this writ of error, in answering this question look into and through the decisions of the Courts of Ohio, to ascertain whether in *any* of them there is *any* decision *any* where to be found warranting the Plaintiff in fairly regarding the act of April 10th, 1880, as constitutional.

This court cannot answer the question when it shall have merely looked at the case of Walker vs. Cincinnati 21st Ohio State Reports, for the whole field of the 64 volumes of Ohio Reports must be gone over by this court, before it can make an intelligent answer to this broad question. After making such inspection of the 64 volumes should it find one or more decisions warranting the Plaintiff in that belief, although the belief was

in the light of later decisions wrong, and the decisions upon which the belief rested were themselves wrong, then must this court address itself to the entire series of its own decisions contained in its 123 volumes, and to the decisions of the Federal Courts of Ohio, to ascertain whether there be any, and if so which decisions they are, that required or warranted the Circuit Court in sustaining Plaintiffs' right to recover.

With the foregoing analysis of this second question, we certainly need not either state any additional rules heretofore laid down by this court in respect to taking juisdiction under certificate of division, nor need we cite the holdings of this court upon such rules.

THIRD.

It remains to consider only the third certified question to-wit: "Whether the former suits, actions and proceedings in the State Courts, or any of them alleged in said answer were and are such adjudication of the questions involved in this action as amounts to a bar to the Plaintiffs' right to recover herein."

There is in this question vagueness, indefiniteness and ambiguity. There is a lack of certainty as to what suits, actions and proceedings the question refers to. Defenses four and five plead or

Another feature showing the vagueness and indefiniteness of the question is in the latter clause, limiting the word adjudication.

The Court is invited to answer whether such suits, actions, etc., were and are such an adjudication of the questions involved in this action."

There is no statement of what questions are involved in this action. This court is left to skirmish through the record and to determine what questions were and are involved in this action. The following part of the inquiry, however, is instructive as to the sweep and scope of the questions involved. They must be and they are the questions and all the questions involved in this case, for their adjudication must amount to a bar to the Plaintiffs' right to recover herein.

This view of this question itself settles the jurisdictional question, for it asks this court to answer a question, which answer will amount to a bar, or will not amount to a bar, of the Plaintiffs right to recover herein. In this way, in this indirect way, this court is asked in this question to pass upon the combined question of law and fact, whether the adjudication in the former suits amounts to a bar to the Plaintiffs *whole* right to recover herein.

Again;

We insist that if this court shall proceed to answer the first and the second certified questions,

and such answer shall be against the validity of the the act of April 10th, 1880, and also against the validity of the bonds sued upon, that would dispose of the whole case.

Should those questions, however, be so answered as to leave the Plaintiff with a right to recover, unless the subject matter is res adjudicata, then and in that case only would this court be called upon to answer the third question.

Manifestly the answering of this question is but an alternative depending upon the manner in which the preceding questions should be answered. The judgment as rendered is answer to these questions as follows; "*no*" to the first, "*yes*" to the second, and "*no*" to the third.

Upon the whole case the motion to dismiss should be sustained."

J. C. LEE
Counsel for Defendant in Error.

Office Supreme Court U. S.
FILED.
OCT 4 1888
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States,

OCTOBER TERM, A. D. 1888.

THE TRUSTEES OF DUBLIN TOWNSHIP,
MERCER COUNTY, OHIO, *Plaintiff in Error*,
vs.
THE MILFORD FIVE CENT SAVINGS INSTITUTION.

IN ERROR IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

BRIEF OF OLIVER J. BAILEY AND JAMES H. SEDGWICK, OF COUNSEL FOR DEFENDANT IN ERROR ON

MOTION TO DISMISS.

E. F. PARKER & CO., PRINTERS, PEORIA.

Supreme Court of the United States,

OCTOBER TERM, A. D. 1888.

THE TRUSTEES OF DUBLIN TOWNSHIP,
MERCER COUNTY, OHIO, *Plaintiff in Error*,
vs.
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IN ERROR IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

BRIEF OF OLIVER J. BAILEY AND JAMES H. SEDGWICK, OF COUNSEL FOR DEFENDANT IN ERROR ON

MOTION TO DISMISS.

This was a suit upon the interest coupons attached to certain bonds issued by the plaintiff in error, in 1880, in aid of a railroad, and purchased for value in that year by the defendant in error. Plaintiff in error received such purchase price, and now seeks to avoid the debt by establishing the invalidity of the bonds after some of the interest coupons were paid. Judgment was had below in 1887.

The cause is in this court upon a certificate of division. Defendant in error interposes a motion to dismiss the writ, because of the insufficiency of such certificate to give this court jurisdiction.

The first cause of action below is stated upon pages 3-7 of the Transcript of Record; the 127th cause on pages 7-11; the other causes being upon other coupons, are omitted from the Transcript by agreement (p. 7). Plaintiff subsequently, with the leave of court, withdrew the 127th cause of action (p. 39).

The defenses are set out at pp. 23-28. Demurrers were filed to these defenses (pp. 36-37); such demurrers being ovér-ruled as to the 2nd and 3d defense (p. 28), and sustained as to the others (p. 39). Defendants below refusing to answer over, judgment was had for $3,819.15.

That the amount in controversy is not sufficient to give this court jurisdiction is undisputed. But the plaintiff in error has endeavored to confer such jurisdiction by procuring a certificate of difference of opinion from the judges below. That certificate seems to us, on the face of it, a groping in the dark by plaintiff in error to find some point of defense somewhere in the whole case. It does not show a contrarity of opinion between the judges below on a single point of law. The whole case is broken up into points, some of which for materiality depend upon the decision of others. The certificate is as follows (p. 39 of Record):

CERTIFICATE OF DIVISION.

"And thereupon the said action came on for hearing upon the demurrer of said plaintiff to the answer of said

defendant, Dublin Township, and the same was submitted upon a full argument of the same; and upon the said question whether said demurrer should be overruled or sustained to the various defenses set forth by said Dublin Township there occurred as questions of law the following:

"*First*—Whether the said answer showed that the law under which the bonds sued upon were issued was in conflict with the constitution of the State of Ohio, and therefore void.

"*Second*—Whether, if said legislation is in conflict with the constitution of the State of Ohio, there had been such decision of the State courts prior to its passage and to the sale or negotiation of the bonds alleged in the petition; that such and similar legislation was constitutional and valid as entitles the plaintiffs to recover under the decisions of the federal courts, notwithstanding the act in question had been declared to be unconstitutional by the court of last resort in the State of Ohio after said bonds were sold.

"*Third*—Whether the former suits, actions and proceedings in the State courts, or any of them alleged in said answer, were and are such adjudication of the questions involved in this action as amounts to a bar to the plaintiff's right to recover herein.

"Upon each of said questions of law the opinion of the judges were opposed, and judgment entered in accordance with the opinion of the presiding judge.

"Thereupon, and on motion of the said defendants that the points on which the disagreement has been made

during the term be stated under the direction of the judges and certified under the seal of the court to the Supreme Court of the United States, to be finally decided—

"It is ordered that the foregoing state of the pleading and of the questions on which the opinion of the judges were opposed, all of which are made under the direction of the judges, be certified to the Supreme Court accordingly and pursuant to the statute in such cases made and provided."

HOWELL E. JACKSON,
Circuit Judge.
M. WELKER,
District Judge U. S., Southern District.

The attempt to bring this case to this court upon such certificate is, in our opinion, an attempt to confer an appellate jurisdiction where none exists. To pass upon the propositions presented is to determine the *entire case*, which would be contrary to the oft repeated adjudications of this court.

Jewell v. Knight, 123 U. S. 426;
Waterville v. Van Slyke, 116 U. S. 699;
California P. Co. v. Molitor, 113 U. S. 609.

The section of the U. S. Revised Statutes bearing upon this subject is as follows:

"652. *Division of Opinion in Civil Causes—Certificate.* When a final judgment or decree is entered in any civil suit or proceeding before any circuit court held by a circuit justice and a circuit judge, or a district judge, or by a circuit judge and a district judge, in a trial or hearing

whereof *any question* has occurred upon which the opinions of the judges were opposed, *the point* upon which they so disagree shall, during the same term, be stated under the direction of the judges and certified, and such certificate shall be entered on record."

Justice Bradley, commenting upon this statute, in his opinion in *California P. Co. v. Molitor, 113 U. S., p. 615,* says:

"This shows that a certificate can only be resorted to where '*a question*' has occurred on which the judges have differed, and where '*the point*' of disagreement may be distinctly stated. This court has frequently held that the *question* referred to must be a question of law, and must be capable of being presented in *a single point.*"

It is not a difference of opinion on the case that is to be certified up, but a special point of law which *can* be distinctly stated. The whole case cannot be broken up into points as is attempted here, and sent up to this court upon a certificate of difference of opinion.

Weeth v. N. E. Mort Co., 106 U. S. 605;
United States v. Bailey, 9 Pet. 267;
Nesmith v. Sheldon, 6 How. 43.

That some of the points certified are hypothetical, their materiality in the case depending upon the decision of other points certified, makes it evident that the whole case has been broken up into points for the adjudication of this court.

Nesmith v. Sheldon, 6 How. 43.

This court will refuse jurisdiction when it is obvious that the case was certified, *pro forma*, to take its opinion without any *actual* difference of opinion in the judges below.

Webster v. Cooper, 10 How. 54;
R. R. Co. v. White, 101 U. S. 98.

That this case was certified *pro forma*, to take the opinion of this court without actual difference in the judges below, see

Webster v. Cooper, 10 How. 54.

When the certificate simply sends up a demurrer to a pleading, it is not definite enough as to the point of difference to give the supreme court jurisdiction.

United States v. Briggs, 5 How. 208.

Nor where it presents the question to be decided on an agreed statement of facts.

Sadler v. Hoover, 7 How. 646.

In determining the first question presented by the certificate, it becomes necessary to consider the entire answer, consisting of more than five record pages, and involving every issue in the case. As well might the certificate submit for the decision of this court, so far as certainty of the point of difference is concerned, the question of whether or not the suit should be decided for plaintiff—that might

be a point for decision, but it would at the same time involve many others.

Suppose this court should select a certain paragraph of such answer, and hold it to show "that the law under which the bonds sued upon were issued was in conflict with the constitution of the State of Ohio, and therefore void." How is the court to know that the judges below were at variance upon that point? They might have been agreed upon that. Thus plaintiff in error would procure the decision of this court when not entitled to it.

Waterville v. Van Slyke, 116 U. S. 699.

The first query of the certificate operates like sending up a demurrer or an agreed state of facts, and if it does not come within the rule as involving only a *single point of difference*, certainly the second and third do not.

OLIVER J. BAILEY,
JAS. H. SEDGWICK,
Of Counsel for Defendant in Error.

Supreme Court of United States.

Dublin Township,

Plaintiff in Error.

—— VS. ——

The Milford Five Cent Savings Institution

Defendant in Error.

Brief for Defendant on Motion to Dismiss.

S. E. BROWN.

J. MARKEE, PR., TOLEDO, O.

UNITED STATES SUPREME COURT.

THE TRUSTEES OF DUBLIN TOWNSHIP, MERCER COUNTY, OHIO,
PLAINTIFFS IN ERROR,
—— vs. ——
THE MILFORD FIVE CENT SAVINGS INSTITUTION,
DEFENDANT IN ERROR.

No. 943.
October Term,
1888.

Brief of Defendant in Error on Motion to Dismiss Writ of Error for Want of Jurisdiction.

The petition of the Plaintiff, the Defendant in Error the Milford Five Cent Savings Institution, alleged 126 causes of action against the Defendants, the Plaintiffs in Error, the Trustess of Dublin Township in Mercer County, Ohio, on as many interest warrants or coupons, on its certain bonds amounting to $12,000, of which the Plaintiff became the bona fide purchaser for value before maturity, due demand of said Defendants for payment thereof having been refused.

The Defendants answered, setting up several defences of which for the purposes of this motion, only the 3d, 4th, 5th and 7th, defences need to be considered.

The Plaintiff demurred to the 4th, 5th and 7th defences as not stating facts sufficient to constitute a defence.

The demurrers were sustained and judgment was entered in accordance with the opinion of the presiding judge.

The Court certified a division of opinion on the questions of law said to be involved and the case is brought to this Court f[illegible]inal determination.

The 4th defence in the Defendants' answer sets up that after issue of such bonds, on a suit in the Ohio State Courts by a majority of the tax payers of Dublin Township, a decree was made perpetually enjoining the collection of the tax to pay these interest warrants or coupons.

This defence also alleges it would be impossible to enforce any taxation against the property to pay such coupons.

The 5th defence alleges that in proceedings by mandamus instituted by this Plaintiff in the Ohio State Courts to compel levy of a tax to pay these coupons, after answer by these Defendants, a decree was made refusing the mandamus and dismissing the petition.

The 5th defence also alleges that such decree was entered by said Circuit Court which court had jurisdiction of said cause and that said judgment stands unreversed in full force.

The 7th defence, [embracing also the 3d defence] sets up:

1. The provisions of Section 6, Article 8, Constitution of Ohio.

2. That such Act was designed to authorize these Townships to vote aid to the construction of a railroad to be owned and controlled by others.

3. That the provisions of such laws were known to Plaintiffs to be impossible, except to aid the construction of a road to be owned and operated by others.

4. That such railroad would have no value except as a link in a chain.

5. That Plaintiffs knew that the Act was an intended evasion of such constitutional provision.

6. That there was no provision for the Town to operate such a road when constructed.

7. That such Act was similar in terms to that declared unconstitutional in 23 Ohio State Reports, page 22.

The 3d defence [incorporated into the 7th defence,] sets up,

1. That the Act under which the bonds were issued was in conflict with the constitution of Ohio.

2. That Dublin Township was the only Township to which the Act by its terms could apply.

3. That it was the only Township in Ohio having a population of 1599 at the census named in the Act.

4. That the Act was one of a series of Acts in aid of a railroad through the town.

5. That such railroad was to be aided and constructed by taxation on property in the Township, not to be owned by the Town but by a railroad corporation.

6. That such railroad was not intended as an independent road, but as a link in a chain of road.

[The remaining subdivisions are not thought to be of importance in this motion.]

There were in form seven defences pleaded in the answer, although they are all embraced either in express terms or by necessary implication in the questions certified.

The first defence admits all the material allegations of fact in the petition.

The second and sixth defence related wholly to individual defences of other Defendants and have no bearing on the defences of these Defendants.

The whole case then rests with the 3d, 4th, 5th and 7th defences.

The certificate of decision states in substance the following as the questions of law:

I.

1. Whether the answer showed that the Act under which the bonds were issued was in conflict with the constitution of the State of Ohio?

2. Whether if so, such law was not therefore void?

II.

1. Whether if such Act was in conflict with the constitution, such decision as alleged in the petition had been made prior to its passage and prior to the sale of the bonds?

2. Whether such and similar legislation was so valid that Plaintiff could recover under the Federal Court's decisions, although such Act was declared unconstitutional by the Ohio State Courts after the sale of bonds?

III.

Whether the former actions, suits or proceedings, in the State Courts or any of them are such adjudications of the questions involved here as to bar Plaintiff's recovery?

I.

It is clear that these questions cover the whole case, which is split up into the several questions.

The 7th defence [which embraces the 3d defence] is covered by the first question certified.

The 4th, 5th and 7th defefences are covered by the 3d question certified.

II.

1. The first question certified is in reality two questions, viz:

a, Whether the answer showed that the Act under which the bonds were issued was unconstitutional, and

b, If so, whether they they [or the Act] were void?

What the answer showed is not a question of law but is one of fact.

This question is not simple but is complex.

The answer alleged several grounds to show that this Act was void.

Page 26. It alleged that the Supreme Court of the State of Ohio had declared the Act unconstitutional.

Page 26. It alleged [in substance] that such Act was void because it had been declared unconstitutional by the Supreme Court of Ohio.

Page 24. That Dublin Township is the only Township to which such Act could apply.

That it was the only Township in the State having the exact census named in the act.

These allegations and many others are pleaded in the answer as possible grounds that the Act was void.

Some of these grounds might be tenable and others not.

Some might be answered by "yes" and others by "no;" yet they are all embraced in the first question certified.

The answer showed many things. Some of them might tend to show that the act was unconstitutional and others not.

"What the answer showed," etc. is quite immaterial, and is quite a different thing from the question whether some certain, definite defence pleaded properly therein was a bar to petitioner's claim.

This first question is fully as objectionable as the question held insufficient in United States vs. Northway, 120 U. S. 327, which was:

"Whether either of the Counts in a certain indictment charged an offence under the laws of the United States."

Such a question was held to be too vague and general as the first question certainly is in this case.

III.

The second question certified is not only too vague and general, but is obscure, indefinite and hypothetical.

It is not entirely clear what is meant by the last clause of the question.

It is not intelligibly connected with the preceding clause.

But conceding that we might substitute the word 'whether' in the place of the word 'that' at the beginning of the second clause so as to make the clause read as it was possibly intended to read, still the whole question is open to every objection.

1. Whether such decision as that alleged in the petition was made before or after the passage of the Act or prior to the sale and negotiation of the bonds, are questions of fact to be proven by common law evidence.

The Plaintiff in Error therefore cannot say that they are conceded to be true.

But they are matters of fact whether true or not true.

They therefore prevent the Supreme Court from having jurisdiction over the second question certified.

2. Even in its amended form the second branch of this question is vague, general and indefinite.

What was the similar legislation mentioned?

What Federal Court decisions are meant?

The question as a whole is not simple, but is very complex.

It could not as a whole be answered by "yes" nor "no;" suppose the first branch of the question be answered by "yes," no question of the law has been decided, and the second branch may be answered consistently by "no."

The second branch of the question is moreover not within the decision on the demurrer.

IV.

The third question certified is too general, indefinite and compound.

The answer herein alleges in bar of the claims pleaded in the petition no less than four separate legal proceedings in the Ohio State Courts, besides those mentioned in the general allegation, [page 26] "That the Supreme Court of the State of Ohio had decided that the law in question and similar statutes were void."

The Court cannot answer this question "yes" or "no."

They might answer "yes" as to one decision and "no" to another. In none of them does it appear that the issues were identical with those presented here.

As each of the questions certified are open to some or all of the objections held good by former adjudications of this Court, the appeal should be dismissed.

POINTS.

1. The rule is well settled that to give the Supreme Court jurisdiction on a certificate of division of opinion, the questions certified must be of law and not of fact nor mixed questions of law and fact.

Weeth vs. N. E. Mort Secur Co, 106 U. S., 605.
Dennistown vs. Stewart, 59 U. S., 490
Silliman vs. Bridge Co., 66 U. S, 84.
Daniels vs R. R Co, 70 U. S, 225.
Brobst vs. Brobst, 71 U. S, 387.
Waterville vs. Van Slyke, 116 U. S., 699.
Wilson vs. Barnum, 8 How., 258.
Paving Co vs. Moliter, 113 U. S., 609.

In such case the Supreme Court has no jurisdiction neither to review weight of evidence nor to hear the appeal where the whole case is certified for adjudication instead of single points, even when the decision turns on questions of law only.

Weeth vs. N. E Mort Secur. Co, Supra
Nesmith vs. Sheldon. 6 How., 41.
U. S. vs. Bailey, 9 Peters, 273.
City of Waterville, vs. Van Slyke, 116 U. S, 699.
White vs. Turk, 12 Peters, 238.
Saunders vs. Gould, 4 Peters, 392.
Harris vs. Elliott, 10 Peters, 25.
United States vs. Briggs, 5 How., 208.
Sadler vs. Hoover 7 How., 646.
United States vs Northway, 120 U. S., 327.
Bank vs. St. Louis Co., 122 U. S., 21.
Jewell vs. Knight, 8 Sup'r Court Reporter, 193.

Each question so certified must contain a distinct proposition of law which the Supreme Court can answer negatively or affirmatively, but the whole case cannot be presented so as to require that Court to decide the whole case on mixed propositions of law and fact.

Though a statement of facts must accompany the certifi-

cate so as to show that the question of law is applicable to the case, the precise point on which the judges differed must be a distinct question of law clearly stated.

City of Waterville vs. Van Slyke, 116 U. S. 699.

Wilson vs. Barnum, 8 How., 258.

Brobst vs. Brobst, 71 U. S. 387.

Wmsp't Bank vs. Knapp, 119 U. S., 357.

St. B'k of Spr. vs. Lt. L. R. F. Co., 122 U. S., 21.

So where after decision on demurrer, the judges certified a division of opinion whether the demurrer, was well taken, although the record shows the grounds of demurrer, the question whether the demurrer should be sustained is not a point in the case within the meaning of the Act of Congress. The Supreme Court cannot look beyond the certificate of division.

City of Waterville vs. Slyke, 116 U. S., 699.

United States vs. Briggs, 5 How., 208.

The question certified must be clearly and distinctly stated, not obscure and ambiguous.

W'msport Bank vs. Knapp, 119 U. S., 357.

Where a question certified is obscure, ambiguous and indefinite, it will not be considered.

Town of Enfield vs. Jordon, 119 U. S., 680.

U. S. vs Northway, 120 U. S., 327.

A question whether either of the Counts in an indictment charges an offence under the United States laws, is too vague and general to give the Supreme Court jurisdiction on a certificate of division.

United States vs. Northway, 120 U. S., 327.

The Supreme Court has no jurisdiction to determine a question certified which under one set of circumstances might be answered one way and under another set, a different way.

Town of Enfield vs. Jordon, 119 U. S., 680.

In that case, the question certified was, "whether said town was not estopped from further defense by the litigation theretofore had between it and Plaintiff."

The Court say: The question is too general in its terms

to admit of a precise answer. As no proper answer can be given to a question stated in such broad and indefinite terms, which admits of one answer under one set of circumstances and of a different answer under another, it must necessarily be disregarded by the Supreme Court.

Neither can a whole case be split up into the form of several questions so as to give this Court jurisdiction.

White vs. Turk, 12 Peters, 238.

It is clear that this whole case is sent up in this record.

Nesmith vs. Sheldon, 6 How., 41.

Luther vs. Borden, 7 How., 47.

Webster vs. Cooper, 10 How., 54.

Jewell vs. Knight, 8 Sup'r Ct. Rep., 193.

S. C., 123 U. S. R., 426.

Hosford vs. Ger. Fire Ins. Co., 8 Sup. Ct. Rep., 1199.

Each of the questions certified must present a distinct point of law, and must not, neither by express terms nor by necessary implication, involve in its consideration the whole circumstances of the case.

Waterville vs. Van Slyke, 116 U. S., 699.

Jewell vs. Knight, 8 Sup'r Ct. Rep., 193.

The Writ of Error should be dismissed.

S. E. BROWN,

Of Counsel for Def't in Error.

HERBERT H. WALKER,

Associate Counsel.

128-514
128-525

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. ~~342.~~ 77

JOSE MENENDEZ AND JOAQUIN MENENDEZ,
APPELLANTS,

vs.

ROBERT S. HOLT, LEONARD J. BUSBY AND CHARLES W. McCUTCHEN.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED OCTOBER 7, 1885.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 342.

JOSE MENENDEZ AND JOAQUIN MENENDEZ, APPELLANTS,

vs.

ROBERT S. HOLT, LEONARD J. BUSBY AND CHARLES W. McCUTCHEN.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

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1 Circuit Court of the United States for the Southern District of New York.

To the honorable the judges of the circuit court of the United States for the southern district of New York:

Robert S. Holt, of the city, county, and State of New York, Leonard J. Busby, of the city of Brooklyn, county of Kings, and State of New York, both of whom are citizens of the State of New York, and Charles W. McCutchen, of the township of North Plainfield, county of Somerset, and State of New Jersey, who is a citizen of the State of New Jersey, who are partners engaged in business at the city of New York under the firm name of Holt and Company, bring this their bill of complaint against José Menendez and Joaquin Menendez, both of whom are aliens and subjects of his Majesty the King of Spain and partners in business at the city of New York under the firm name of José Menendez and Brother.

And thereupon your orators complain and say that your orators are dealers in and buy and sell flour and grain; that they are copartners in such business and transact their said business under the firm or copartnership name of Holt and Company; that said Robert S. Holt, one of your orators, has been engaged in such business of buying and selling flour and grain for more than than thirty-five years at the city of New York and for more than twenty-
2 five years last past has been at the head as senior or leading partner of the firm of Holt and Company; that the said firm of Holt and Company has from time to time been changed or dissolved by the retirement from the then existing firm of various persons as members thereof, but in each such instance a new firm or copartnership has been immediately formed, which said new firm has thereupon succeeded to the firm name, good will, brands, trademarks, and other assets of such preceding firm, so that there has been no interruption of the name and business identity of Holt and Company for said period of twenty-five years and over, and for such period the said firm name has been well known in the business community and has had at all times and still has a high reputation in such trade and with the public in the city of New York and elsewhere; and your orators aver that they are now legally seized of the good will and all the trade-marks ever at any time used by the firm of Holt and Company, and especially the trade-mark hereinafter mentioned.

Your orators further show unto your honors that during or about the year 1861 the said firm of Holt and Company selected, adopted, and appropriated to their exclusive use the arbitrarily selected and fanciful words or term "La Favorita" as a brand or trade-mark to distinguish and identify a certain flour of their, the said Holt and Company's, selection and preparation and sold by such firm; that such words or term "La Favorita" as a brand or trade-mark for flour was first used by said firm of Holt and Company and had never prior to its adoption and use by them, as your orators are informed and verily believe, been used upon or in connection with or

in designation of flour, and that your orators, as successors to said prior firms of Holt and Company, are now and your orators and such preceding firms of Holt and Company have always been entitled to use it as a brand or trade-mark as applied to flour,
3 and that no one but your orators and their predecessors in such firm of Holt and Company has ever at any time had a right to use and no one but your orators now have a right to use the same as a brand or trade-mark as applied to flour or any words or designation substantially like it, and that since the time of the adoption and first use of said trade-mark, to wit, since the year 1861, the same has been continuously used and applied to flour by said firm of Holt and Company until the present time.

Your orators further show that said firms of Holt and Company have at all times exercised great care in the selection, packing, and preparation of the flour packed and sold by them under this brand, "La Favorita," and have carefully advertised the same, and by their care and efforts have extensively introduced the same to the trade, and the same has come to be widely known in and desired by the trade in the United States and elsewhere, and that the sale of the flour so stamped or marked has been and is now an important part of your orators' business and therefrom large profits have accrued to your orators, and there has been and is now a settled and permanent demand for your orators' said flour so by them marked and branded as aforesaid.

Your orators further show that the manner in which such brand has been and is used by them consists in stamping or stenciling the same upon the heads of barrels, half barrels, and quarter barrels of such flour and upon the sides of bags of such flour, the words "La Favorita" being stenciled in large and conspicuous letters and being the prominent feature of the brand or mark, and with such words there are generally stenciled in smaller and less conspicuous letters the name of said firm, Holt and Company, and words or marks indicating the quality and quantity of flour contained in such bag, barrel, or other package, but your orators claim that the essen-
4 tial feature of their said lawful trade-mark is the said words or term "La Favorita," and may be exclusively used by them as a trade-mark as applied to flour in any form and whether associated with other words or marks or not.

And your orators further show that on or about the 28th day of February, A. D. 1882, your orators being entitled to the exclusive use of said trade-mark, and being citizens of the United States, they complied in all respects and particulars with the requirements of the statute of the United States, to wit, the act of Congress entitled "An act to authorize the registration of trade-marks and protect the same," approved March 3, 1881, by causing to be recorded in the Patent Office of the United States on the 17th day of October, 1881, a statement specifying their firm name and place of business, the class of merchandize and particular description of goods comprised in such class by which the said trade-mark had been appropriated, a description of the trade-mark with *fac-simile* thereof showing the mode in which it had been applied and used and the length of time

during which the trade-mark had been in use; by making payment of a fee of twenty-five dollars in the same manner and for the same purpose as the fee required for patents, and, further, by filing, on or about the 28th day of January, 1882, a declaration under the oath of a member of the firm to the effect that the firm claiming protection for the trade-mark had a right to the use of the same and that no other person, firm, or corporation had a right to such use, either in the identical form or in any such near resemblance thereto as might be calculated to deceive; that the trade-mark was used in foreign commerce and that the *fac-similes* presented for record were a true copy of the trade-mark sought to be protected.

And thereupon the said lawful trade-mark was, on the 28th day of February, 1882, duly registered in the said Patent Office,
5 and a due and formal certificate of registration, bearing date on said day, signed by E. M. Marble, Commissioner of Patents, and sealed with the seal of the Department of the Interior of the United States, was issued and delivered to your orators, whereby and by a compliance with the laws of the United States in the premises there was confirmed, recognized, and secured to your orators the exclusive right to use within the United States the said lawful trade-mark for the period of thirty years from said 28th day of February, 1882, as by reference to said certificate of registration, declaration, and other papers will more fully and at large appear and to which your orators beg leave to refer.

Your orators further show that the said respondents, José Menendez and Joaquin Menendez, are partners engaged in business as commission merchants at the city of New York, in the said southern district of New York, and have long been cognizant of the high reputation of your orators' flour aforesaid and of the said trade-mark lawfully applied and used to distinguish and identify the same; that, being so cognizant and well knowing the rights of your orators in the premises, in order to injure your orators by diverting the profits in the sale of the genuine article and otherwise, the said respondents have, at divers times, both prior to and since the 28th day of February, 1882, and since your orators acquired the exclusive right to use said trade-mark as aforesaid, at the city of New York, in said southern district of New York, willfully and fraudulently bought, offered, and sold flour of like character and appearance and put up in packages like your orators', to which have been attached and applied marks and brands embodying in every instance a reproduction, counterfeit copy, and imitation of the aforesaid lawful trade-mark, to wit, the words "La Favorita," owned and used by your orators, as hereinbefore set forth,
and have so bought, offered, and sold said packages of flour
6 so put up in imitation of your orators' goods and having applied and attached thereto said false and fraudulent marks and brands, embodying in every instance said false and fraudulent reproduction and counterfeit of said lawful trade-mark as and for the true and genuine flour prepared and sold by your orators and by them alone, and this to your orators' great loss and injury, and although often requested to desist the said respondents refused to do

so—that is to say, the said respondents have at the time and place aforesaid applied the words "La Favorita" to packages of flour not prepared or sold by or for your orators, and, having done so, have sold the flour thus falsely marked as the flour selected by your orators and refuse to desist from so doing, to your orators' great loss and injury actually sustained.

Your orators charge that the said flour so fraudulently sold by the respondents as and for the flour of your orators as aforesaid has been of an inferior character, and has been sold at a price below the price of the genuine goods, thus damaging both your orators' reputation and amount of sales.

Your orators say that they cannot with certainty state the exact amount of profits diverted by the said respondents as aforesaid, nor can they correctly estimate the amount of damage and injury sustained by them by reason of the fraudulent acts complained of, but believe the same to be large, and charge that it amounts to the full sum of ten thousand dollars, and pray that the respondents may full and true disclosures make as to the same, and may be decreed to account therefor in full, and otherwise to respond in damages as may appear to be equitable.

To the end, therefore, that your orators may obtain relief in the premises in this honorable court, where they can alone obtain relief, they humbly pray—

1. That said Jose Menendez and Joaquin Menendez may
7 be made respondents to this bill and compelled to answer each and every allegation therein contained under oath the same and as fully as if directly interrogated as to each.

2. That the said respondents may be compelled to render before a commission of this court a full, true, perfect, and complete account of all profits of every description diverted from your orators or made by the use of any and all imitations of said trade-mark used by your orators as aforesaid or by the sale of goods to or unto which such imitation or imitations may have been in anywise attached, and may be decreed to pay over to your orators the full and entire amount of such profits.

3. That the said commission be also required to ascertain and report to this court what injury and loss have otherwise been inflicted upon your orators by the imitation by the respondents of said trade-mark owned and used by your orators as aforesaid.

4. That the said respondents, their agents and servants, be forever enjoined and restrained from in any manner using said trade-mark or any mark or marks in anywise substantially similar thereto in such manner and form as to mislead and from otherwise selling or offering to sell any imitation or imitations of your orators' goods.

5. That a restraining order may be issued without delay, directed to the respondents aforesaid, their agents and servants, enjoining and restraining them from any use of said trade-mark during and until the termination of this suit, and from using any imitation thereof, and otherwise enjoining and restraining the fraudulent acts complained of.

6. That said respondents be compelled to deliver and surrender to the marshal of this court, or to some other person or persons
8 to be appointed by this court, any and all brands or stencils embodying said trade-mark or any imitation thereof whatsoever, and that the marshal or other person or persons be commanded and directed to destroy the same.

7. And, finally, to the end that equity may be done and that the relief herein prayed for and all other relief that it may be righteous in the premises to administer may be afforded your orators, may it please your honors such relief fully to grant and to award against the said José Menendez and Joaquin Menendez a writ of subpœna of the United States of America, issuing out of and under the seal of this honorable court, commanding them, on a certain day therein to be named and under a certain penalty, to be and appear in this honorable court, then and there to answer all and singular the premises and to stand to and perform and abide such further order, direction, and decree as may be made against them.

And your orators, as in duty bound, will ever pray, &c.

S. ST. J. McCUTCHEN,
Solicitor for Complainants, 170 *Broadway, New York City.*

ROWLAND COX, *Of Counsel.*

9 UNITED STATES OF AMERICA, } *ss:*
Southern District of New York, }

Robert S. Holt, of lawful age, being duly sworn, deposes and says as follows, to wit:

I am a member of the firm of Holt & Company, the complainants in the foregoing bill named. I have read the said bill of complaint and know the contents thereof. I know, of my own knowledge, that all the matters and things stated as within the knowledge of complainants are true in all respects and particulars, and as to the statements touching all other matters and things I verily believe them to be true.

ROBERT S. HOLT.

On this 17th day of July, 1882, before me personally came Robert S. Holt, personally known to me to be the identical person described in the foregoing affidavit, and subscribed and made oath to the same.

Witness my hand and seal of office.

[L. S.]

CHAS. C. GILL,
Notary Public, New York County.

Endorsed: Circuit court of the United States for the southern district of New York. Robert S. Holt *et al. vs.* Jose Menendez *et al.* Bill of complaint. S. St. J. McCutchen, solicitor for complainant-, 170 Broadway, N. Y. U. S. circuit court. Filed July 17, 1882. Joseph M. Deuel, clerk.

10 U. S. Circuit Court.

ROBERT S. HOLT, LEONARD J. BUSBY, & CHARLES W. McCUTCHEON

ag'st

JOSE MENENDEZ & JOAQUIN MENENDEZ.

Please take notice that I am retained by and hereby appear for the above-named defendants and demand that a copy of the complaint and all other papers be served on me at my office, 200 Broadway, New York city.

Yours, etc., JOHN HENRY HULL,
Att'y for Def'ts, 200 *Broadway.*

Dated New York, July 27th, 1882.

To S. St. J. McCutcheon, compl'ts' sol'r; Jos. M. Deuel, Esq., clerk.

11 (Endorsed:) U. S. circuit court. Robert S. Holt & others ag'st Joze Menendez & ano. Copy notice of appearance. John Henry Hull, def'ts' att'y, 200 Broadway, N. Y. U. S. circuit court. Filed July 28th, 1882. Joseph M. Deuel, clerk.

12 Circuit Court of the United States for the Southern District of New York.

ROBERT S. HOLT, LEONARD J. BUSBY, & CHARLES W. McCUTCHEN

ag'st

JOSE MENENDEZ & JOAQUIN MENENDEZ.

The answer of the defendants to the bill of complaint of Robert S. Holt, Leonard J. Busby, and Charles W. McCutchen, complainants.

These defendants, reserving to themselves all right of exception to the said bill of complaint, for answer thereto, saith:

They admit that the firm of Holt and Company has been from time to time changed or dissolved, and they deny that in each such
13 instance the new firm formed under that name has thereupon succeeded to the good will, brands, trade-marks, and other assets of such preceeding firm, and they further deny that the complainants are now legally seized of the good will and all the trade-marks ever at any time used by the firm of Holt and Company, and they deny that said complainants are legally seized or are the owners of the trade-mark "La Favorita."

And defendants, further answering, allege that in the year 1861 and up to the year 1868 one Stephen O. Ryder was a member of the complainants' firm of Holt and Company, and was one of the originators of the said trade-mark "La Favorita," and has always and does now own and use the same as a proprietor and owner

thereof, and has continually used the same as his individual trade-mark since the year 1868, and has always been entitled to use the same.

14 That said Ryder has at all times exercised great care in in the selection, packing, and preparation of the flour packed and sold by him under the brand of "La Favorita" and has carefully and extensively advertised the same and by his care and efforts has extensively introduced the same to the trade, and the same has come to be widely known in and desired by the trade in the United States and elsewhere, and that the sale of the flour so marked or stamped has been and is now an important part of said Ryder's business, and that all the flour bought and sold by defendants marked with the name "La Favorita" has been of the production of said Ryder and is so known to be by defendants' customers and for that reason is in great demand by said customers.

And defendants further allege that the manner in which said Ryder marks the said flour so prepared by him is entirely different from the manner in which said complainants mark their said flour, and that in particular the said Ryder uses in connection with the name "La Favorita" his own name in full in conspicuous and different letters so as to draw attention thereto and to indicate that the said flour is of his own particular preparation and in order to distinguish the same from the flour of complainants and from the flour of many other dealers who have for many years used the said name of "La Favorita" as a brand of flour, as is well known to said complainants and without objection by them during the whole of said time.

And defendants allege that they have no knowledge or information of the registration of said trade-mark in the Patent Office, as is alleged in said complaint, and they therefore deny the same.

And, further answering, said defendants deny that they have ever willfully and fraudulently bought, offered, and sold flour put up in packages like those of complainant or to which have been attached and applied marks and brands embodying in any in-

15 stance any reproduction or counterfeit or copy or imitation of the trade-mark "La Favorita," alleged to be owned by the complainants, and they deny that they have so offered and sold packages of flour put up in imitation of complainants' goods as and for the true and genuine flour prepared and sold by complainants, and they further deny that they have ever sold flour marked with the name "La Favorita" as the flour selected by complainants, but, on the contrary, have always sold such flour as the special selection of said Ryder.

And said defendants, further answering, allege that they have no knowledge or information sufficient to form a belief as to any of the other allegations in said complaint contained, and they therefore deny the same.

And the said defendants, further answering, deny that the said complainants are entitled to the relief or any part thereof in the said complaint demanded; and these defendants pray the same advantage of their aforesaid answer as if they had pleaded or demurred

to the said bill of complaint, and these defendants pray to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

JOSE MENENDEZ,
JOAQUIN MENENDEZ,
Defendants.

JOHN HENRY HULL,
Solicitor and of Counsel for Def'ts, 200 Broadway, N. Y.

16 *Replication.*

UNITED STATES OF AMERICA, }
Southern District of New York, } *ss:*

Jose Menendez, being duly sworn, says that he is one of the defendants in the above-entitled action, and that he has read the above answer subscribed by him and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated on information and belief, and as to those matters he believes it to be true.

JOSE MENENDEZ.

Sworn before me this — day of August, 1882.
[L. S.]
GEO. G. SICKLES,
Notary Public, Kings and N. Y. Co.

Endorsed: U. S. circuit court. Robert S. Holt *et al.* against Jose Menendez *et al.* Answer. J. H. Hull, sol'r for def'ts. U. S. circuit court. Filed Sept. 1, 1882. Joseph M. Deuel, clerk.

Circuit Court of the United States, Southern District of New York.
In Equity.

ROBERT S. HOLT *et al.*
vs.
JOSE MENENDEZ and JOAQUIN MENENDEZ.

The replication of Robert S. Holt, Leonard J. Busby, and Chas. W. McCutchen, complainants, to the answer of Jose Menendez and Joaquin Menendez, defendants.

These repliants, saving and reserving unto themselves, now and at all times hereafter, all and all manner of benefit and advantage of exception which may be had or taken to the manifold insuf-
17 ficiencies of the said answer, for replication thereunto, say that they will aver, maintain, and prove their said bill of complaint to be true, certain, and sufficient in law to be answered unto, and that the said answer of the said defendants is uncertain, untrue, and insufficient to be replied unto by these repliants, without this, that any other matter or thing whatsoever in the said answer contained material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed or

avoided, traversed or denied, is true; all which matters and things these repliants are and will be ready to aver, maintain, and prove as this honorable court shall direct, and humbly pray as in and by their said bill they have already prayed.

S. ST. J. McCUTCHEN,
Complainants' Solicitor, 170 *Broadway, N. Y. City.*

ROWLAND COX, *Of Counsel.*

[Endorsed:] U. S. circuit court, southern dist. of New York. In equity. Robert S. Holt *et al. vs.* Jose Menendez *et al.* Replication U. S. circuit court. Filed Sept. 29, 1882. Joseph M. Deuel, clerk.

United States Circuit Court, Southern District of New Xork. In Equity.

ROBERT S. HOLT *et al. vs.* JOSE MENENDEZ *et al.*

Testimony taken on the part of complainants under and pursuant to the 67th rule of the Supreme Court of the United States, as amended, before John A. Shields, Esq., a standing examiner of said court.

18 NEW YORK, *Oct. 24th*, 1882.

Present: Rowland Cox and S. St. J. McCutchen, Esqs., of counsel for comp'ts, and John Henry Hull, Esq., of counsel for def'ts.

NEW YORK, *October 31st*, 1882—2 o'clock p. m.

Met pursuant to adjournment.

Present: Counsel as before.

(Complainants' counsel offers in evidence certificate of registration of trade-mark No. 9144, granted to Holt and Company, dated Feb. 28th, 1882.)

(The same is marked Complainants' Exhibit A, Oct. 31, 1882, J. A. S., Ex'r.)

(Also a certified copy of the records of the Patent Office, which is marked Complainants' Exhibit B, Oct. 31st, 1882, J. A. S., examiner.)

ROBERT S. Holt, called as a witness on the part of the complainants, having been duly sworn, testifies as follows in answer to questions propounded by complainants' counsel:

1 Q. Please state your name, age, residence, and occupation.

A. Robert S. Holt; age, 51; reside at 120 Waverly Place, in this city; occupation, flour and commission merchant.

Q. 2. You are a member of the firm of Holt & Co., the complainants in this cause?

A. I am.

3 Q. And have been for how long a time?

A. I have been a partner in the business ever since the resumption of the firm name.

4 Q. That was during what year, as nearly as you can remember?

19 A. Prior to 1858. I wish to say that not being aware that there was to be a formal examination this afternoon I did not refer to any papers as to dates and cannot be positive in regard to them.

5 Q. Please state, as near as you are able to, when the first firm of Holt & Company was organized and what its business was.

A. I cannot state precisely. It was in existence in 1845, when I went into its employ as a boy. Its business was then flour and commission.

6 Q. You speak of your having been a partner ever since the resumption of the firm name, which occurred, I understaad you say, prior to 1858. Please explain what you mean by the words "resumption of the firm name."

A. Originally composed of my grandfather and George C. King. The use of the firm name was intermitted in 1846, the business being continued in the name of my father, Philetus H. Holt, until the resumption of the style Holt & Co. which I referred to.

8 Q. I understand you to say that as early as 1846 the name of Holt & Co. was in use?

A. It was.

9 Q. That in 1846 the name Philetus H. Holt was adopted, which was used until 1858, as nearly as you remember?

A. It was.

10 Q. And in 1858 or thereabouts the firm name of Holt & Company was resumed?

A. My impression is that it was resumed prior to that, but in the absence of papers I will say that it certainly was at that time.

11 Q. And the firm name Holt & Company has been used without interruption since 1858?

A. It has. I suppose that it is proper for me to state that the firm name has been Holt & Company, it being the invariable custom of the firm to spell out the word "company" in full.

12 Q. Has the business of the firm of Holt & Company been changed at any time?

20 A. It has not in its general scope.

13 Q. Their business has been, I understand you, from the first substantially the same as it is now?

A. In its nature; yes.

14 Q. The firm has continued from the first in the business of dealers in flour and commission merchants?

A. It has.

15 Q. I observe that you emphasize the fact that the word "company" has been invariably spelt in full; will you please say, if you know, why that course was pursued?

A. I meant to state that it had been so employed by us, that style having been adopted for distinctiveness in regard to our correspondence and otherwise. By others the abbreviation "Co." is frequently used.

16 Q. Was there a firm in New York of Holt & Co. in 1858?

A. There was no firm of "Holt & Co." that I am aware of, but a neighboring firm of P. Holt & Son in the tobacco business.

17 Q. And to distinguish your firm from this firm of Holt & Son I understand you employed the word "company," spelling the word in full?

A. We did.

18 Q. You are able to speak positively on this point?

A. As one motive, the other being the resumption of the prior firm of that name referred to.

19 Q. What I mean is, you are positive about your firm having spelled the word "Company" in full prior to the year 1858?

A. I am.

20 Q. The firm name, then, has been uninterruptedly used without any variation since prior to the year 1858?

A. It has.

21 Q. That is for a period of how many years?

A. Over twenty-four years.

21 22 Q. How about your signs; how many have you had since 1858?

A. But two principal signs; the firm name is repeated on the columns of the building.

23 Q. Have those signs been taken down since 1858?

A. Only at the time of removal to our present store, where the second and larger one was substituted for the former.

24 Q. That was during what year, the date of your removal to your present place of business, as you remember?

A. I think about 1862.

25 Q. And the sign has remained over the door without any change ever since?

A. It has.

26 Q. That firm of Holt & Company has, then, I understand you, preserved its business name with very great care?

A. It has.

27 Q. Will you please say why?

A. To retain the good will and prestige attaching to it through three generations.

28 Q. Please let us understand a little more fully what you mean by "the good will and prestige attaching to it through three generations."

A. I mean its business reputation and good repute of brands with which its name was associated.

29 Q. Had it brands in use as early as 1858?

A. The concern had its own brands of buckwheat and flour long prior to 1858, and from my first employment by it.

30 Q. These brands, I understand, were used by Holt & Company when the firm name were resumed?

A. They were transmitted from one firm to its successor, as each change in partnership occured, as part of the good will of the business.

31 Q. Are any of the brands used in 1858 now employed by Holt & Company?

22 A. They are.

32 Q. In regard to the business of Holt & Co. since 1858, has it ever been interrupted at any time?

A. It has not.

33 Q. Its customers have continued to do business with it without interruption?

A. They have with remarkably few exceptions, considering the lapse of time.

34 Q. In regard to its consignors, have they continued to do business with it without interruption?

A. They have with the natural changes that necessarily take place in any business.

35 Q. You mean, I understand, only such changes as are incident to any continuous business?

A. I do.

36 Q. The business identity of the firm of Holt & Company, then, has never been lost or discontinued at any time since 1858?

A. It has not.

37 Q. Let me ask about the drays (I suppose you have drays in your business), the stationery, etc. Has the firm name been used continously in connection with incidental matters of this kind?

A. For transportation of our goods we use wagons or trucks, as they are called, on which, as in the other matters to which the question refers, the firm name has been prominently used.

38 Q. And without variation since 1858?

A. Yes.

39 Q. And during this interval since 1858, I understand, you are positive the good will of the firm has not been disturbed in any way?

A. It has not.

40 Q. In regard to the bank account of Holt & Company, has it been continuous since 1858?

A. In answering the question I do not mean to imply that we have kept our account continuously in one bank, but the account has been continuous and without interruption.

23 NEW YORK, *November 8th*, 1882—2 o'clock p. m.

Met pursuant to adjournment.

Present: Counsel for respective parties.

The direct examination of ROBERT S. HOLT continued by Mr. Cox:

41 Q. I understood by your last answer that the firm of Holt & Company kept a continuous bank account, although the account was not kept at a single bank. Am I right in this?

A. Yes.

42 Q. Please say whether you have refreshed your memory by examination of written matter; and, if you have, please give the exact date the name of Holt & Company was resumed.

A. I have not, but my partner, Mr. Busby, confirmed my impression that it was prior to 1858 and on the 1st of February, 1855.

43 Q. Please say, if you know, when the trade-mark described in Complainants' Exhibit A (handing the witness Complainants' Exhibit A) was adopted by the firm of Holt & Company, and give the particulars, as far as you are able to, of its adoption. State who originated it and other details.

A. As nearly as I can state it, in or before the year 1861 it was adopted. The name originated with myself, and I devised and cut the stencil which was first employed in its use myself.

44 Q. Have you a distinct recollection that you yourself cut the stencil?

A. Perfectly so.

45 Q. Do you remember where you were?

A. In the office, 230 Front street, where our office was.

46 Q. Do you remember your being in any particular room or other circumstances connected with the cutting of the stencil?

A. I remember its being at my office, as I stated in my last answer. There is but one office.

24 47 Q. Was it not a little unusual that you should yourself cut the stencil instead of applying to a stencil-cutter to make it?

A. On the contrary, having some expertness in that way, it has been my custom from boyhood to design and to cut shipping marks and flour brands as occasion required.

48 Q. With whom, if you know, did the idea of using the brand "La Favorita" originate?

A. It was entirely my own suggestion.

49 Q. Are you able to connect the idea with any fact or circumstance; I mean can you give any reason why you selected the name?

A. I cannot with positiveness, but think I was influenced by the attractiveness of the name and having attended a performance of an opera of that name.

50 Q. This brand, "La Favorita," has been used, has it not, as shown in the certificate of registration offered in evidence and marked Complainants' Exhibit A, by the firm of Holt and Company?

A. Yes, sir.

51 Q. Has it been used continuously since 1861?

A. It has.

52 Q. As a brand or trade-mark for flour, I understand?

A. Yes.

53 Q. In what trade chiefly?

A. Mainly in filling orders for West India shipping.

54 Q. It has been used chiefly, then, in the West India markets?

A. It has.

55 Q. Please say what you understand to be the manner in which the words "La Favorita" have been applied upon the flour branded by defendants, Menendez & Brother?

A. In the usual manner, viz., by being printed upon bags and stencilled upon barrels.

25 Cross-examination by Mr. HULL:

56 X Q. Who constituted the firm of Holt & Company in 1861?
A. Robert S. Holt, Stephen G. Searls, and S. Oscar Ryder.
57 X Q. How long did that continue unchanged?
A. Until the year 1868 or 1869.
58 X Q. What change was then made?
A. On the expiration of the then partnership, S. Oscar Ryder withdrew, the remaining partners continuing the business.
59 X Q. During the time that S. Oscar Ryder was a partner was this trade-mark, "La Favorita," used by the firm?
A. It was.
60 X Q. At the time of the organization of the firm, were there any written articles of copartnership?
A. There were.
61 X Q. Can you produce them?
A. I cannot.
62 X Q. Are they in existence and in your possession?
A. Yes.
63 X Q. I will ask you to produce them at the next meeting.

Complainants' counsel objects to the production of the articles of copartnership, as being immaterial and irrelevant, and give notice that they reserve the right to instruct the witness not to produce them unless directed to do so by the court.

64 X Q. In answer to question 30 you have said these brands were transmitted from one firm to its successor, as each change in partnership occurred, as part of the "good will" of the business. I ask you now to produce the copartnership articles of the firm
26 of which S. Oscar Ryder was a partner, and of the firm which succeeded such last-mentioned firm.

Complainants' counsel renew their objection and reservation.

65 X Q. At the time of the dissolution of the firm of which S. Oscar Ryder was a partner were any papers executed in reference to the dissolution?
A. No; it was not the custom with our house.
66 X Q. Have you ever had any controversy with Mr. S. Oscar Ryder in relation to this trade-mark of "La Favorita" before any arbitration committee?
A. No.
67 X Q. Did you not once make complaint to the exchange, of which you are both members, in relation to his alleged infringement of your trade-marks?
A. Yes; in regard to the infringement of one of our trade-marks.
68 X Q. Which one was that?
A. "La Selecta."
69 X Q. Was he not then using "La Favorita" as well as "La Selecta?"
A. Not to our knowledge or belief.
70 X Q. Do you swear to this positively?

A. I do, or I should have embraced it in the complaint regarding the other infringement "La Selecta."

71 X Q. "La Selecta" was used by your firm while S. Oscar Ryder was a partner, was it not?

A. It was.

72 X Q. What was the result of this complaint? If it was in writing, please produce it.

Counsel give the same notice and reservation as was made in respect to the articles of copartnership, the objection to apply to the last part of the question relating to the production of the complaint.

27 A. The board of managers of the produce exchange unanimously characterized the conduct of Rowland & Ryder in that matter as inconsistent with just and equitable principles of trade.

73 X Q. Now, you are quite through?

A. With stating what the result was.

74 X Q. I now ask you to state whether the decision was not in printing.

A. It was.

(Motion by counsel for defendant to strike out all but the last answer of the witness as disingenuous, improper, and as giving the contents of a written document he was asked to produce.)

75 X Q. Why did you not frankly say that the result the committee reached was in writing when you were so asked in the first instance?

A. Because I understood the question to be, first, what was the result, and my answering the enquiry as to whether it was in writing to be objected to by my counsel.

76 X Q. If you knew the result was in writing, did you not know that it would be fairer to produce that writing rather than to give your own interpretation of it?

A. The result was asked; the announcement of the result, which was in writing, I consider a different thing.

77 X Q. Then do you mean what you have stated as the characterization of the board of managers was not embraced in what you have termed the announcement of the result in writing?

A. The announcement which we received from the board contained, I think, the very words employed by me in giving the result.

(Motion by counsel for defendant to strike out this answer as not responsive and as giving the contents of a written document witness is asked to produce.)

28 78 X Q. Will you swear that your complaint in that matter was not dismissed?

A. I cannot answer that question without an explanation. It was dismissed by the complaint committee, but on appeal to the full board the above-stated action was taken by them.

79 X Q. Do you mean to swear that any proceedings whatever were taken before the full board?

A. Before what we term the full board—that is, a quorum of the members competent to act.

80 X Q. What were these proceedings; was any complaint there renewed—investigation of witnesses or testimony of any kind taken?

A. There was.

81 X Q. State what was done.

A. Again I am at a loss to answer. I wish to know with what detail I am to state.

82 X Q. Were witnesses examined before the full board?

A. There were.

83 X Q. Who were they?

A. There were quite a number; I cannot state them all now.

84 X Q. Give any names.

A. The parties to the complaint on both sides; other flour merchants and millers and clerks in our office.

85 X Q. Give the names.

A. Henry Rowland, S. Oscar Ryder, Robert S. Holt. I am unable to state with certainty whether my partner was examined.

86 X Q. Give the names of the full board who were present.

A. I cannot without referring to the minutes of the meeting.

87 X Q. Can't you give the name of any one or more?

A. Archibald Baxter, Daniel A. Eldridge, Gilbert Oakley, R. H. Laimbeer, Benjamin C. Bogart I remember, but cannot name others with certainty.

29 88 X Q. Are any of the written decisions, complaints, or other documents relating to either of these transactions before the complaint committee or the full board in your possession?

A. The announcement of the decision of the full board may be; none other that I know of.

89 X Q. I now ask you to produce them at the next meeting.

NEW YORK, *November* 23*d*, 1882.

Met pursuant to adjournment.

Present: Counsel as before.

The cross-examination of Mr. HOLT continued by Mr. HULL:

90 X Q. Have you produced, Mr. Holt, the articles of copartnership of Holt & Company of 1861?

A. I handed them to my counsel, Mr. McCutchen.

(Witness hands Mr. Hull said articles of copartnership.)

91 X Q. Is that your signature and the signatures of Searls and of S. Oscar Ryder to this paper?

A. Yes.

(Counsel for defendants offers in evidence said articles of copartnership, marked Defendant's Exhibit A, J. A. S., Ex'r, November 23d, 1882.

(Objected to by complainants' counsel as immaterial and irrelevant.)

92 X Q. Have you produced the articles of copartnership of the firm which succeeded this last-mentioned firm?

A. I have not.

30 93 X Q. Was there any difference between these articles you produce and those articles referred to in the last question?

(Complainants' counsel object to the ques- as calling for secondary evidence, and also as calling for a conclusion on the part of the witness.)

A. According to my recollection, there was; I have not recently compared the two said articles.

94 X Q. Then you cannot give the substance of the difference between the two?

A. Not literally; I remember no difference but the express statement of what had previously been tacitly understood in regard to the good will of the business residing in myself, this being done in consequence of the disagreement between my former partners—at my father's suggestion.

95 X Q. When you formed the copartnership succeeding that between Mr. Searls and yourself did you execute any articles of copartnersbip?

A. I did.

96 X Q. Will you please produce those articles of copartnership?

(Complainants' counsel reserve the right to direct the witness not to produce them on the ground that they are immaterial and irrelevant.)

A. I cannot at present. I have not them with me. I will hand them to my counsel before the next meeting.

97 X Q. I ask you to produce them here in person before handing them to any person?

98 X Q. Who constituted the firm that succeeded yourself and Mr. Searls?

A. Myself, Mr. Searles, and Mr. Leonard J. Busby.

99 X Q. How long did that firm continue?

A. I cannot state the dates accurately without reference to the papers.

31 100 X Q. Who constituted the firm that succeeded the last-mentioned firm?

A. Mr. Busby and myself.

101 X Q. Were there articles of copartnership for this firm?

A. I am not certain whether there were articles executed or whether we signed an assent to continue the previous articles with the requisite changes in interest.

102 X Q. If there were articles are they in your possession?

A. They probably are.

103 X Q. Will you please produce these articles?

(Complainants' counsel object as in the case of the other articles of copartnership, which have not been produced.)

104 X Q. Who constituted the firm that succeeded the last-mentioned firm?

A. Robert S. Holt, Leonard J. Busby, Jerome B. Wheeler.

105 X Q. Were there articles of copartnership of that firm?

A. I have no doubt there were?

106 X Q. Will you please produce these articles of copartnership?

(Complainants' counsel object as in the case of the preceding articles of copartnership.)

107 X Q. Who constituted the firm that succeeded the last-mentioned firm?

A. Robert S. Holt, Leonard J. Busby, Charles W. McCutchen.

108 X Q. And they are the present plaintiffs and the present firm?

A. They are.

109 X Q. Were there any articles of copartnership of this firm?

32 A. There were.

110 X Q. Will you please produce them?

(Same objection on the part of complainants' counsel.)

111 X Q. Have you produced the decision of the complaint committee or of the board of managers of the produce exchange as requested at the last meeting?

A. That is it; I produce it herewith.

112 X Q. (Showing paper to witness.) What is this; a resolution of the board of managers?

A. It is the official announcement of the result reached by the board of managers in the matter of our complaint against Rowland and Ryder.

(Paper offered in evidence by defendants' counsel and marked Defendants' Exhibit B, Nov. 23d, 1882, J. A. S., Ex'r.)

113 X Q. Did you have any decision in writing of the complaint committee when the complaint was dismissed by them?

A. I am not certain—should think it probable from the custom in such cases.

114 X Q. Why have you not produced that?

A. The reason is that it is not in my possession, and I do not know where it is if it were ever received.

115 X Q. In whose possession is it?

A. I have already answered that I do not know.

116 X Q. Where did you ever see it?

A. As before stated, I am not positive that such written communication was ever made.

117 X Q. How did you know the result if you are not positive a written communication was ever made or ever received?

A. I am not clear, as above stated, whether the complaint committee gave their decision in writing or stated it orally, the
33 parties being present or representatives. I have already stated that I think there was such a written decision, but am not positive enough to testify to it. It was the custom, as above stated, to give a written decision.

118 X Q. Was not the decision of the complaint committee that the complaint you made to them was wholly unsustained by the evidence?

A. I cannot say that it was, except as their dismissing the complaint might indicate.

119 X Q. Did they not so state that the complaint was wholly unsustained by the evidence in their decision?

A. I do not know that they did.

120 X Q. Will you swear that they did not?

A. I am unable to state the exact terms in which they announced their decision.

121 X Q. What was your relation to the produce exchange board at that time?

A. That of manager and secretary.

122 X Q. Was not Mr. Ryder at that time using other brands and trade-marks which had originated during his connection with you as partner?

A. Not to my knowledge, the first instance known being that complained of.

123 X Q. When did you first know of any other infringement of his or what you claimed as an infringement?

A. I cannot state accurately; I think within a year after the trial of the complaint before the board of managers.

(Complainants' counsel objects to the question and answer as immaterial and irrelevant.)

124 X Q. What did you then know of in relation to any claim of infringement?

(Complainants' counsel here enter a general objection to all evidence having relation to the infringement by defendants or
34 others of the trade-mark directly involved in the suit and any and all other trade-marks owned by complainants or their predecessors as immaterial and irrelevant.)

(The objection to stand to all questions the same as if made specifically to each when propounded.)

A. I was informed that Rowland and Ryder were offering brands of flour for sale the right to which belonged to us.

125 X Q. Give the names of the brands.

A. The brand in question was one "La Favorita."

126 X Q. Any others?

A. There were others, but I do not now distinctly recall.

127 X Q. Do you recollect a brand called Potomac used by your firm?

A. I do.

128 X Q. Was not this the only brand that had any real value as a trade-mark at this time?

A. It was not.

129 X Q. Had the brand La Favorita any real value at that time?

(Objected to as immaterial and irrelevant.)

A. It had some—not so much as the Potomac.

130 X Q. Had these others that you speak of as having been used by Ryder any value at that time?

A. They all had, more or less.

131 X Q. Had not Potomac as much value in itself as all of them put together at that time?

(The same objection, to be continued to all questions of a similar purport.)

A. Having much the largest trade, I think it had.

35 132 X Q. Do you recollect any conversation or offers you made to Mr. Ryder in regard to this brand—Potomac?

(Objected to as immaterial and irrelevant.)

A. No conversation since he ceased to be a member of the firm; that I remember as distinct from a conversation embracing all the brands employed by Holt & Company.

133 X Q. Do you recollect or not a conversation distinctly with sole reference to this brand, Potomac, just prior to Mr. Ryder leaving your firm?

A. I remember a conversation in which this brand—the Potomac brand—was the most prominent topic.

134 X Q. What was the conversation?

A. Mr. Ryder, referring to the then expected withdrawal of Mr. Searls from the firm, alluded to his possibly intending to use the Potomac brand and agreed with me as to the impropriety of his doing so, the good will in the brand belonging to myself.

135 X Q. Do you recollect Mr. Ryder refusing once to take out a trade-mark on Potomac when you had suggested to him to do so?

(Objected to as immaterial and irrelevant.)

A. No, sir; I did not suggest to him to do so.

136 X Q. Did he not say that he would not take out such a trade-mark because the brand belonged to Holt, Searls and Ryder, the three partners?

(The same objection continued.)

A. He did not.

137 X Q. You never had such a conversation as indicated by the last two questions?

A. We had a conversation on the subject, but of a very opposite tenor.

138 X Q. Of a tenor as you have indicated in your answer only?

A. I don't understand the question.

36 139 X Q. My question is whether anything occurred than is stated in your answer where you say he agreed with you as to the impropriety of his using the Potomac brand.

A. My recollection is that in the event of Ryder continuing as a partner and to guard the new firm from the use of the Potomac brand by Mr. Searls the suggestion to copyright the brand was made by him and negatived by me.

140 X Q. In your answer given some few questions back do you mean that Ryder agreed with you as to the impropriety of his using the Potomac brand or Mr. Searls using it?

A. Mr. Searls for the reason given in last answer, it being then contemplated that Mr. Searls would withdraw from the firm and Mr. Ryder remain.

141 X Q. Did Mr. Searls ever use this brand?

A. As a member of the firm of Holt & Company only.

142 X Q. Never afterwards?

A. He died while continuing to be a partner of the firm.

NEW YORK, *December 1st*, 1882—11 o'clock a. m.

Met pursuant to adjournment.

Present: Counsel as before.

The cross-examination of Mr. HOLT continued by Mr. HULL:

143 X Q. Have you produced any of the articles of copartnership called for at the last examination?

A. I have produced all but those relating to the current partnership, which I supposed I had with the others until reaching here.

Defendants' counsel offers in evidence articles of copartnership of Holt & Company, 1869 and 1872, which is marked Defendants' Exhibit No. 1, Dec. 1, 1882, J. A. S., Ex'r.

37 Defendants' counsel also offers in evidence articles of copartnership of Holt & Company, 1873, which is marked Defendants' Exhibit No. 2, Dec. 1, 1882, J. A. S., Ex'r.

Defendants' counsel also offers in evidence articles of copartnership of Holt & Company, 1876–1877, renewed 1877–1878, which is marked Defendants' Exhibit No. 3, Dec. 1, 1882, J. A. S., Ex'r.

Defendants' counsel also offers in evidence articles of copartnership of Holt & Company, 1878 and 1881, which is marked Defendants' Exhibit No. 4, Dec. 1, 1882, J. A. S., Ex'r.

The different exhibits referred to are objected to by complainants' counsel as immaterial and irrelevant excepting so far as they may serve to show the existence of the copartnership.

144 X Q. Why have you not produced the articles of copartnership of the present firm, plaintiffs in this case?

A. I have already answered, and am perfectly willing to produce them when found.

145 X Q. Do you think they are lost?

A. Mislaid, merely.

146 X Q. Did S. Oscar Ryder ever, after your dissolution with him, use the Potomac brand?

A. Not to my knowledge.

147 X Q. During the time that you mentioned within which he has used the brand "La Favorita" have you ever complained to him or to his firm of such use?

(Complainants' counsel object to the question and to all other questions of similar import as immaterial and irrelevant, the objection to stand to all questions the same as if made specifically to each.)

38 A. Not personally, having had no communication with him or his firm.

148 X Q. Do you know of anybody else in your interest so complaining?

A. I think my partner, Mr. Busby, has, but I am not certain of that.

149 X Q. When do you think he so complained?

A. I cannot fix the time, but it is my impression that he did so.

150 X Q. On what is your impression based?

A. On general recollection.

151 X Q. Do you recollect whether the communication or complaint was in writing or orally?

A. My impression is that it was a verbal remonstrance merely.

152 X Q. Were you present at the time?

A. I was not; never holding or taking part in any conversation with Mr. Ryder since the time referred to.

153 X Q. What time do you refer to?

A. I refer to the termination of the proceedings before the board of managers.

154 X Q. What answer did Mr. Busby tell you Mr. Ryder made, if any?

(Objected to as calling for secondary evidence.)

A. I have already stated that while it is my impression that such remonstrance was made I am not fully certain of it, and have no remembrance of the reply, if any.

155 X Q. Was the complaint made, if at all, before the time that Mr. Busby was your partner?

A. I cannot say.

156 X Q. Was he associated with you in business before he was your partner?

A. He was.

157 X Q. For how long?

A. For a number of years. I do not remember how many.

39 158 X Q. Was he with you while Mr. Ryder was a partner?

A. He was.

159 X Q. Has not Mr. Ryder, since his dissolution with you, used other brands which had been used by you together?

(Objected to by complainants' counsel as immaterial and irrelevant, the objection to stand to all questions intending to show the

use or infringement of other brands than that involved in the suit; the objection to stand without repetition to all questions the same as if made to each.)

A. Not to my knowledge, although I think it probable.

160 X Q. During the whole term of your partnership with S. Oscar Ryder did not he have his signature at the bank for the firm?

A. He had, I presume, for the whole term.

161 X Q. Did he not have as full power in the use of the firm name as yourself?

A. He did.

162 X Q. Did he not have as full ownership in the firm assets as yourself?

A. In what were regarded as assets.

(Complainants' counsel objects to the question and answer as involving a conclusion of law.)

163 X Q. Were any other documents in writing used in transmitting the assets of one of your firms to the succeeding firm other than the articles of copartnership?

(Same objection.)

A. There were not—that is, no legal form; but a trial balance and appraisement of assets.

40 NEW YORK, *December* 5, 1882—3 o'clock p. m.

Met pursuant to adjournment.

Present: Counsel as before.

(Counsel for defendants offer in evidence articles of copartnership of complainants' firm, marked "Defendants' Exhibit, December 5, 1882, J. A. S., Ex'r.)

(Exhibit objected to by counsel for complainants as immaterial and irrelevant.)

NEW YORK, *December* 12, 1882—1.30 o'clock p. m.

Met pursuant to adjournment.

Present: Counsel as before.

Redirect examination of ROBERT S. HOLT:

164 Re-D. Q. In answer to X Q. 67, in which you are asked whether you did not once make complaint to the exchange, of which you are both members, in relation to an alleged infringement of your trade-marks by S. Oscar Ryder, you say you did make a complaint. Will you be kind enough to state the nature of that complaint as nearly as you are able to?

(Objected to by counsel for defense unless the written complaint is produced and all documents connected therewith.)

(Defendants' counsel desires to examine witness as to whether the complaint referred to was or was not in writing.)

By defendants' counsel:

165 Re-D. Q. Was or not the complaint in writing?

A. It was in writing.

41 166 Re-D. Q. (Question 164 repeated.)

(Objected to by defendants' counsel on the ground that the complaint is the best evidence, and that the question calls for secondary evidence.)

(Complainants' counsel say the objection is well taken as far as it goes, and they will produce whatever documentary evidence they can obtain, but insist, as defendants' counsel elected to bring out the witness' recollection concerning the complaint, they are entitled to have his recollection in full.)

A. The firm of which I am a member complained of the firm of Rowland & Ryder for conduct inconsistent with just and equitable principles of trade in counterfeiting a brand of flour used by us as a trade-mark, which they knew to be so used and claimed by us, and which both partners of said firm had promised to refrain from using in connection with other brands.

167 Re-D. Q. And I understand you have stated that it alone was the subject of the complaint?

A. It was; as we knew of their using no other of our brands.

168 Re-D. Q. You are positive of this?

A. I am.

169 Re-D. Q. Do you remember who composed the complaint committee at the time the complaint referred to was made?

A. Gilbert Oakley, Archibald Baxter, R. H. Laimbeer.

170 Re-D. Q. These gentlemen heard the complaint and dismissed it?

A. Practically dismissed it.

171 Re-D. Q. And an appeal was taken from their decision to the board of managers?

A. It was.

172 Re-D. Q. Who unanimously reversed the action of the complaint committee?

42 (Objected to as leading and as calling for the contents of a written paper and as secondary evidence.)

A. Practically so, their decision stating that the conduct of Rowland & Ryder was, as complaint stated, inconsistent with just and equitable principles of trade.

173 Re-D. Q. Do you know whether the gentlemen who composed the complaint committee, whose names you have given, were among the members of the board of managers and whether they took part in the final decision?

A. They were present and took part in the proceedings, and from the official communication declaring the decision unanimous I presume they assented to it.

174 Re-D. Q. Under the rules of the exchange it was their duty to sit with the board of managers?

—. ——.

175 Re-D. Q. How do you know the members of the complaint committee took part in the proceedings of the board of managers?

A. From distinct personal recollection.

176 Re-D. Q. Are you able to say what the grounds of defense were before the complaint committee; upon what ground the use of the brand was sought to be justified by the accused?

(Objected to as the question calls for secondary evidence unless the witness states the defense was oral.)

(Defendants' counsel insists to examine witness on this point.)

177 X Q. (By counsel for defendants.) Was not the defense in writing?

A. The defense was not in writing, although a written paper was produced in it.

178 Re-D. Q. Please let us have your recollection of what the defense was before the complaint committee?

43 A. That, although among the brands which they had promised not to use, our firm had really no title to it, as they claimed it to belong to the estate of a deceased customer, from whose executor they had recently purchased the brand.

179 Re-D. Q. They justified their use of the brand, then, because they claimed to have purchased it from the estate of a deceased customer?

A. They did.

180 Re-D. Q. Was there any other defence?

A. There was not.

181 Re-D. Q. You are positive about this?

A. Quite so, the production of the bill of sale of the brand seeming to the committee to terminate the case.

182 Re-D. —. This defence was made before the complaint committee, I understand, and your testimony is confined to the defence made before it?

A. It is.

183 Re-D. Q. Do you know whether there is any record evidence of the grounds of defence before the board of managers?

A. I think there is none.

185 Re-D. Q. Please say, if you know, whether the defence was the same before the board of managers that it was before the complaint committee.

A. I think it was, resting wholly upon the alleged title by purchase.

186 Re-D. Q. Please say under what circumstances the brand "La Selecta" was first used by S. Oscar Ryder. I mean in respect of its being publicly used or otherwise.

A. I do not know how to answer that question.

187 Re-D. Q. What is your difficulty?

A. I know nothing of the circumstances of such use beyond discovering the fact of the brand being shipped late in the day; I think the day preceding complaint.

188 Re-D. Q. How late, if you know, in the day; was it shipped at an unusual hour?

A. It was after six o'clock, after the usual hour for closing stores.

44 189 R. D. Q. At the time or about the time that S. Oscar Ryder retired from the firm of Holt & Company did any conversation with him take place at which you were present having relation to the brands of the firm of Holt & Company? If you answer affirmatively please give the conversation as fully as you can.

A. I can give the purport, but not the exact terms.

190 R. D. Q. Please do so.

A. I requested Mr. Ryder to wait in the office, as I wished to speak to him in the presence of Mr. Searls. I then referred to his having on the evening previous caused impressions to be taken for him of the various brands employed by Holt & Company, protesting that he should not make use of them, as, by his own theory, when he supposed that Mr. Searls was to leave the firm instead of himself, the brands remained the property of the firm succeeding the former firm. After some opposition Mr. Ryder promised us both not to use any of such brands excepting one or more which he had originated for a relative, whose trade would doubtless follow him, and which we gave him.

191 R. D. Q. What were the brands to the use of which you assented? Was La Favorita one of them?

A. It was not. Victoria, I think, was one. I do not remember others, if there were any.

NEW YORK, *December* 14, 1882—2 o'clock p. m.

Met pursuant to adjournment.

Present: Counsel as before.

Defendants' counsel offer in evidence a copy of the minutes of the complaint committee and the full board of the produce exchange, and same is marked Defendants' Exhibit "D," Dec. 14, 1882, J. A. S., Ex'r.

45 192 Re-D. Q. I understand that you are able to say positively that at the interview referred to in your answer to question 190 Mr. Ryder promised, without reservation, that he would not make use of the brand "La Favorita?"

(Objected to by counsel for defense as leading and as not correctly stating the answer to question 190.)

A. Not directly by naming that brand, which, however, was among those of which he had caused impressions to be taken and against the use of which I protest.

(Defendants' counsel moves to strike out the last part of this answer, after the words "that brand," as not responsive.)

193 Re-D. Q. And upon your protesting he promised, did he not, that he would not make use of any of the brands except those which he had originated and which were used in trade with his relative?

A. He did.

(Objected to as leading.)

194 Re-D. Q. Among the brands that he promised he would not use I understand you have stated was the brand "La Favorita?"

(Objected to as leading and as not correctly stating the evidence.)

A. It was.

195 Re-D. Q. As there seems to be some misunderstanding on the part of counsel, will you have the kindness to state again exactly what he promised?

A. I cannot state more clearly than I tried to in my evidence at the last meeting. He had impressions taken of all our brands with apparent intent of using the same. His conversation and his promise referred — them all without specifying either.

46 196 Re-D. Q. This promise was made in the presence of Mr. Searls?

A. It was.

197 Re-D. Q. Who I think you have said is no longer living?

A. He is not living.

198 Re-D. Q. Returning to the action of the board of managers of the produce exchange, how do you explain the fact that if the conduct of Rowland & Ryder was adjudged to be objectionable no punishment was imposed beyond the passage of a resolution?

(Objected to as immaterial and irrelevant.)

A. Because, on its becoming evident what the decision of the board must be, Mr. Ryder stated that this was a "partnership quarrel and Holt & Company wished to get us put off the floor." I rose and said to the board that I had no such desire, and to relieve his apprehensions would waive the usual discipline in such cases and be satisfied with their characterizing their action as it deserved, which ought to be sufficient to deter any honorable house from repeating the offence.

199 Re-D. Q. Did the board act upon your suggestion?

A. Their communication of the result indicates that they did.

200 Re-D. Q. What action did you take, if any, after you received the announcement of the decision of the board?

A. No farther action, the result being what I asked for, and that, I hoped, would check any repetition of the offence.

Recross-examination:

201 Re-X Q. How do you know the board would not have taken exactly the action they did without your interference or suggestion?

47 A. It is impossible to know, but I can only infer from the fact that suspension or expulsion constituted the usual discipline in such cases.

202 Re-X Q. Why may it not have been that their resolution conveyed the whole scope of what they deemed proper under the circumstances for all that you know?

A. As in the former answer, I cannot know beyond the views ex-

pressed to me by a member of the complaint committee and of the board very shortly afterwards, viz., that he was satisfied that Messrs. Rowland & Ryder were capable of doing any wrong of which they could evade the penalty. I judge, therefore, that the board regarded the offense as grave, although parties to a controversy, being obliged to withdraw while the board comes to its decision, cannot tell their individual views.

203 Re-X Q. Then you think the opinion of one man as expressed to you out of the whole board justifies your assertion that all the rest of the members were influenced by the same idea?

A. I have not so asserted.

204 Re-X Q. Have you not asserted that it was evident the board followed your suggestion from the nature of the decision they arrived at?

A. I said they appeared to have done so.

204½ Re-X Q. And have you not also stated that your reason for that opinion is because one member told you that he was satisfied that Messrs. Rowland & Ryder were capable of doing any wrong of which they could evade the penalty?

A. I have not, but mentioned that remark as grounds for my opinion that, had it not been for my suggestion, the board might not have come to a decision in exact accordance with it, but have inflicted further discipline.

205 Re-X Q. Is this your whole reason for your answer that it is evident the board followed your suggestion?

48 A. I do not remember stating that it was evident, but that their notice of their decision appeared to indicate it.

206 Re-X Q. And is this reason your reason, then, and all of your reason for such an opinion?

A. It is, so far as I remember after so long a time; whether I had any other conversation with members of the board or other circumstances influenced such opinion.

207 Re-X Q. With whom was this conversation that you speak of as a member of the board?

A. With Mr Archibald Baxter.

208 Re-X Q. Is he living?

A. I believe he is.

209 Re-X Q. Did you ever ship any goods after six o'clock at night?

A. Very frequently in busy times.

210 Re-X Q. Why do you characterize, then, that hour as an unusual hour?

A. Because at that time it was not usual and the goods in question could have been shipped earlier, and would have been by the party who bought them but for the desire of Rowland & Ryder that they should not be seen.

211 Re-X Q. How do you know they so desired?

A. The purchaser's carman, who was also carting goods from our store, told my porter that he had got through delivering from Rowland & Ryder all the goods but certain half barrels of flour which they wished to deliver themselves, not desiring the brand to be seen.

212 Re-X Q. What is the name of this porter?

A. Peter Fraley—I am not certian of the name—Peter Fraley, I think.

213 Re-X Q. Where is that porter?

A. He is driving a truck, I believe, at present; I do not know for whom.

214 Re-X Q. What is the name of the carman?

A. I do not know.

215 Re-X Q. Do you know what was the condition of Rowland & Ryder's business during that day?

49 A. I have no knowledge except as my porter reported what the carman said to him.

216 Re-X Q. Did you ever hear of merchants shipping their own goods before or since?

A. Very commonly.

217 Re-X Q. Did Rowland & Ryder deny having used the brand "La Selecta?"

A. Never, to my knowledge; our proof would have rendered denial useless.

(Defendants' counsel moves to strike out the last part of the answer as not responsive.)

218 Re-X Q. Has not the brand "La Selecta" been used by them and their successors ever since?

Objected to as immaterial and irrelevant.

A. I do not know that it has or that it has not.

219 Re-X Q. Do you not know that it is entirely probable that they have used it?

Objected to as calling for a conjecture on the part of the witness

A. I think it is very probable, but I have no personal knowledge of the fact.

220 Re-X Q. Have you ever made any complaint of their using it since?

A. I have not.

221 Re-X Q. Have you not repeatedly seen, since Mr. Ryder left your firm, quotations of "La Favorita" and other evidences of his using the brand?

Objected to by complainants' counsel as immaterial and irrelevant on the ground that proof of infringement or of acquiesence by the complainants in the use of their brand cannot properly be shown as a justification of continued infringement, and also as not being cross-examination:

A. I have seen such quotations indicating that he was at least offering it for sale.

50 222 Re-X Q. Have you not known of his using other brands than "La Selecta" and "La Favorita" that had been used by your firm while he was a member?

A. I have not known of myself, but I have been informed that he has offered to make some such brands.

223 Re-X Q. Which ones?

A. I cannot state one with positiveness.

224 Re-X Q. Why have you not made complaint as to this?

(Complainants' counsel objects to this whole line of testimony as immaterial and irrelevant.)

A. From aversion to litigation and dislike to controversies before the board of managers, especially while one of their number.

225 Re-X Q. Why, then, have you selected this brand of "La Favorita" for controversy?

A. I was holding the copyright of it.

226 Re-X Q. Did that make any difference about your dislike to controversies?

A. No difference as to my disinclination.

227 Re-X Q. Is there not some other reason, then?

A. Certainly there is.

228 Re-X Q. Is not the real reason because you have been pushed in competition with the brand "La Favorita?"

(Objected to as incompetent, immaterial, and irrelevant.)

A. If others had not used it, thereby competing with us, there would be no occasion for this suit.

229 Re-X Q. Is that, then, the real occasion of this suit?

A. It is.

230 Re-D. X Q. Why was there not the same occasion for suit upon the other infringements?

51 (Complainants' counsel protest that evidence why complainants did not attempt to put a stop to "other infringements" is immaterial and irrelevant.)

A. The other infringements, so far as my firm were aware, were not sufficient in extent to make us consider it worth while.

231 Re-X Q. Is it not the fact that more of the popularity of the brand "La Favorita" is owing to the fact that others than your firm have made it popular by selling the same brand?

A. It is not, to the best of my knowledge.

232 Re-D. X Q. Have not other persons than S. Oscar Ryder manufactured the brand "La Favorita"?

(Objected to by counsel for complainant for reasons heretofore stated, and also because the defendants have recited in their answer that there is title to the mark that is the subject of the suit in S. Oscar Rider, the existence of which title they are estopped to deny by the pleadings in the case.)

Defendants' counsel calls attention to folio 5 of the answer.

A. They have.

233 Re-X Q. Who are the parties who have used "La Favorita?"

A. In stating that others had used the "La Favorita" brand I spoke from current report and information; not of my own knowledge. I would prefer not to give the names referred to at present, as we may take some steps against them also.

234 Re-X Q. I insist upon your giving me the current reports and the information that you have.

(Objected to as calling for secondary and hearsay evidence, and the witness is instructed that he is not required to answer the question unless directed to do so by the court.)

52 235 Re-X Q. Question repeated.

A. I decline to answer under advice of counsel.

(The defendants' counsel asks the examiner to certify the record to the court.)

236 Re-X Q. How long have you known that these parties have used the brand "La Favorita?"

(Objection as before.)

A. Some for several years; others within more recent time—within a year.

237 Re-X Q. How many have been using it for several years?

A. Besides Ryder there are but two that I know of, or rather understand, to have been using it.

238 Re-X Q. These parties so using it have been responsible pecuniarily during this time, have they not?

(Objection continued.)

A. So far as I know and believe, yes.

239 Re-X Q. Have you ever notified these parties to stop using the brand?

A. Not personally.

240 Re-X Q. Has any one ever notified them, to your knowledge?

(Same objection.)

A. Not to my positive knowledge; I think verbal remonstrances were at times made by my partner.

241 Re-X Q. To whom and when?

A. I cannot specify the time; I think Rowland & Company, George B. Robinson.

242 Re-X Q. And to these only?

A. I think also to Austin, Nichols & Company.

243 Re-X Q. Any others?

A. And George V. Hecker & Co.

244 Re-X Q. Is that all?

A. All that I think of.

53 NEW YORK, *January 3d*, 1883—2 o'clock p. m.

Met pursuant to adjournment.

Present: Counsel for respective parties.

The recross-examination of Mr. ROBERT S. HOLT continued by J. H. HULL, Esqr.:

245 Re-X Q. Do you think of any other parties whom you have notified not to use La Favorita?

(Objected to by complainants' counsel as immaterial and irrelevant for reasons heretofore stated.)

Complainants' counsel gives notice that he will ask the court to strike out the answer at the proper time, which course he will pursue instead of directing the witness not to answer.

A. I do not.

246 Re-X Q. Is this all, then, of those who have used the brand, according to your present knowledge?

(The same objection.)

A. It is.

247 Re-X Q. Have you ascertained the name of the carman referred to in the last day's testimony?

(The same objection.)

A. I have not.

Re-redirect by ROWLAND COX, Esq.:

248 Re-Re-D. Q. How do you account for the fact that the brands of Holt & Company were not made the subject of division at the time of the dissolution of the last partnership of which S. Oscar Ryder was a member?

(Objected to as immaterial.)

54 A. It was not the custom of the firm for the brands to be objects or appraisal for division. Besides, in a recent conversation with Mr. Ryder, he had assented to the view that they remain with the continuing firm. I mean the conversation when it was supposed that Mr. Searls would withdraw from the firm.

249 Re-Re-D. Q. Please let us know a little more definitely, if possible, what that conversation was and when it took place.

A. I cannot give the exact conversation after such a length of time. It must have occurred at least two months, I think, before the expiration of the partnership.

250 Re-Re-D. Q. The substance of the conversation was what?

A. While both Mr. Searls and Mr. Ryder were friendly toward me they were very unfriendly towards each other, and Mr. Ryder apprehended on the part of Searls an attempt to use our brands if he left the firm. The conversation was on that subject and in substance as above said, that the brands belonged to the continuing firm, Mr. Searls having no title to them should he leave the firm.

Re-recross by J. H. HULL, Esq.:

251 Re-Re-X Q. Is the flour known as La Favorita a mixture of one or more manufactures?

(Complainants' counsel objects to the question as immaterial and irrelevant.)

A. It is not.

252 Re-Re-X Q. Is it a flour made by yourselves or somebody else?

(Same objection.)

A. Somebody else.

253 Re-Re-X Q. Has it always been made by the same person?

(Complainants' counsel objects to the question for the following reasons:

55 1st. Because it is not recross examination.

2d. Because it is immaterial and irrelevant.

3d. Because it may be made the basis of defence not set up in the answer.)

A. It has not.

254 Re-Re-X Q. How many different persons has it been made by?

(Objection continued.)

A. It is impossible for me to say. As a proprietary brand we apply it to any flour that we think will sustain the character of the brand.

255 Re-Re-X Q. Then it simply represents each time that you use it a flour that, in your judgment, is equal or superior to a flour for which it was used?

(The same objection.)

A. It does.

256 Re-Re-X Q. It does not represent any particular variety of wheat flour or any manufacturer's make?

(The same objection.)

A. It does not.

Re-re-redirect by ROWLAND COX, Esq.:

257 Re-Re-Re-D. Q. What do mean when you say you used the brand "La Favorita" on flour that you think will sustain the character of the brand?

A. The object in adopting the brand and maintaining a uniform standard of quality was to retain the trade formed for it. Consequently the brand is not used on flour likely to detract from its reputation.

ROBERT S. HOLT.

56 LEONARD J. BUSBY, a witness produced on the part of the complainants, being duly sworn, deposes and says:

Examined by Mr. COX:

1 Q. Please state your name, age, residence, and occupation.

A. Leonard J. Busby; thirty-six years of age; I reside at 145 Hewes street, Brooklyn, N. Y., and am a merchant.

2 Q. You are one of the complainants in this cause.

A. I am.

3 Q. How long have you been connected with the firm of Holt and Company, and in what capacity?

A. For over twenty years, beginning as a junior clerk, then as salesman until entering the firm.

4 Q. How long have you been a partner?

A. Since February 1st, 1873.

5 Q. In what capacity were you employed immediately before that time?

A. As salesman and confidential clerk.

6 Q. You were connected with the firm during the period when S. Oscar Ryder was a member?

A. A part of the time.

7 Q. What part of the time and in what capacity were you employed?

A. About seven years in the capacities above stated.

8 Q. When did Mr. Ryder withdraw from the firm?

A. January 31st, 1869.

9 Q. In what capacity were you employed at that time?

A. As salesman and confidential clerk.

10 —. What were your relations with Mr. Ryder at that time?

A. We were intimate friends.

11 Q. Have you any recollection of a conversation taking place with him at the time of his withdrawal from the firm of Holt
57 & Company concerning a conversation that he had with Mr. Holt about the brands of the firm? If you say you have please give the conversation as far as you are able to.

A. I remember such a conversation occurring directly after his interview with Mr. Holt.

Counsel interrupting.

12 Q. You know he had a conversation with Mr. Holt?

A. I do.

13 Q. Who was present at this conversation, if you know?

A. Mr. Holt, Mr. Searls, and Mr. Ryder.

14 Q. Now, please proceed with your answer.

A. Mr. Ryder came to me at my desk immediately after the interview and stated, I have had to give in; I have had a good talking to, and have promised never to use any of Holt & Company's brands.

15 Q. Are you able to be positive about any of the words used by him at the conversation referred to in your last answer?

A. To the best of my remembrance those were his exact words.

16 Q. Do you remember any incident connected with the conversation that you can mention?

A. I remember his slapping me on the back and laughing.

17 Q. Did this conversation take place immediately after he came out of Mr. Holt's office?

A. It did.

18 Q. Are you able to explain why it made such an impression on your mind that you can recall the language he used?

A. I think the chief reason is that about six months afterwards, when I expected to be called as a witness against him, the interview

was comparatively fresh and was at that time impressed on my mind.

20 Q. Did S. Oscar Ryder ever say to you or in your presence that he had no claim to the brands of Holt & Company, or words to that effect?

58 (Objected to as leading.)

A. I received that impression at the interview I have stated.

21 Q. Were you present during the proceedings before the complaint committee of the produce exchange when he was on trial for using the brand "La Selecta?"

A. I was, expecting to be a witness.

22 Q. Please state what, if anything, you heard him say there concerning the brands of Holt & Company.

A. He repeated the statement before the committee that he had promised not to use any brands belonging to Holt & Company at the time of his withdrawal from the firm.

23 Q. You heard him make that statement?

A. I did.

24 Q. You are positive about it?

A. I am, for the reason that I expected to testify to the same fact and his statement made mine unnecessary.

25 Q. Then you did not testify to the fact?

A. I did not.

26 Q. You remember what explanation he gave of his use of the brand "La Selecta?"

A. That it did not belong to Holt & Company, but to a third party.

27 Q. Did you hear him make any other statement about the brands of Holt & Company before the complaint committee?

A. Not that I remember.

29 Q. Mr. Ryder had been a clerk in the employ of Holt & Company before he became a partner, had he not?

A. He had.

30 Q. For how long a time, if you know, and in what capacities?

A. I think about six years, as junior clerk, assistant book-keeper, and cashier.

59 31 Q. Was any one present beside yourself and Mr. Ryder at the time of the conversation just referred to?

A. To my certain knowledge one person—possibly another.

32 Q. Who was the one person?

A. Mr. Curtis, our book-keeper at that time.

33 Q. Is he living?

A. He is not.

Cross-examined by J. H. HULL, Esq.:

34 X Q. How do you know that the conversation or interview immediately preceding Mr. Ryder's conversation with you had reference to any subject-matter whatever?

A. Only by the testimony of the parties concerned.

35 X Q. Did Mr. Ryder refer to it solely by the words you have testified to as coming from him—did he not?

A. I think he referred to it subsequently. It was my duty to arrange the number of matters incidental to his departure, and I believe this subject was again referred to in conversation with the brand that he took with him—a brand by consent of all interested.

36 X Q. But at the time of this conversation with you all the knowledge you had of what occurred at the prior interview was what you inferred from his language?

A. I hardly know how to answer that, sir; my knowledge of what occurred came from his remark, but I was aware of the object of the previous interview.

37 X Q. What brand was this that he took with him?

A. I think it was a brand named "Aurora" that had been used in business with a personal friend of his.

38 X Q. How long has S. Oscar Ryder been using the brand "La Favorita?"

60 (Objected to as immaterial and irrelevant.)

A. I think about eleven or twelve years.

39 X Q. How long have others been using it?

(Objection continued.)

A. I am unable to answer that question definitely.

40 X Q. Please answer as definitely as you can.

(Same objection.)

A. I should say from a few months to five or six years.

41 X Q. These different uses of the brand have been known to Holt & Company during the whole period, have they not?

(Objection continued.)

A. During the different periods named.

42 X Q. Have any legal proceedings been taken ever to stop the use of the brand by these different parties?

(Same objection.)

A. Not to my knowledge.

43 X Q. Has not S. Oscar Ryder used other brands that had been used while he was a member of the firm?

(The same objection.)

A. I think very probably, although personally I do not know it.

44 X Q. The brand "La Favorita" is applied, as I understand, indifferently to any manufacturer's flour of a certain grade, is it not?

(Objected to as not cross-examination and as immaterial and irrelevant.)

A. It is applied conscientiously to any flour that our careful examination pronounces equal to the standard on which we have made the reputation of the brand.

61 45 X Q. It does not represent the manufacture of any special mill, does it?

(The same objection.)

A. We would not trust any special mill to manufacture flour for that brand without our special examination.

46 X Q. And, as a matter of fact, you take from any mill manufacture that has the requisite quality of flour?

(The same objection.)

A. Any mill that our judgment as experts confirms the quality equal to our standard.

47 X Q. How do you distinguish the flour branded as "La Favorita" from the flour branded with your other brands?

(The same objection.)

A. I don't get your meaning, sir.

48 X Q. Please name any other brand that you use of a fine quality of flour.

(The same objection.)

A. "Miranda."

49 X Q. Now, wherein does the flour branded as "La Favorita" differ from the flour branded as "Miranda?"

(The same objection.)

A. The "Miranda" flour is whiter, less strong, milled in a different method, and of a different value on the market.

50 X Q. How is "Miranda" milled?

(The same objection.)

A. I would like to ask my counsel if I may decline to answer on the ground that this information is valuable to us in our business, and, if given here, may be used by our competitors in business to our disadvantage.

62 51 X Q. I am sorry for this, but there is no other way for me to proceed with my case, except by examining you upon the issues of the case, although it may be prejudicial and disagreeable for you to answer.

Question repeated.

NEW YORK, *January 12th*, 1883—3 o'clock p. m.

Met pursuant to adjournment.

Present: Counsel for respective parties.

The cross-examination of Mr. LEONARD J. BUSBY continued by J. H. HULL, Esq.:

52 X Q. Do you keep on hand any samples of flour with which to compare the flour you brand as La Favorita?

(Objected to by counsel for complainant as immaterial and irrelevant and not cross-examination.)

A. We do.

53 X Q. And how long do you keep those samples on hand?

(Same objection.)

A. I can't give any exact time.

54 X Q. Are your samples taken from the manufacture of any special mill?

A. Not always.

55 X Q. From what mills have you taken samples for this purpose?

(Same objection.)

A. I decline to answer unless instructed to do so by my counsel. I would add for the same reason that I declined to answer Mr. Hull's question at our last meeting.

56 X Q. If you do not always take the samples from the same mills how can you be certain that the flour you brand as "La Favorita" is equal to your standard?

(Same objection.)

63 A. We use our experience of from fifteen to thirty years to determine the fact.

57 X Q. Do you compare each sample as you use it successively in your business with the preceding sample that you have used?

(Complainants' counsel renews his objection to this line of examination as being immaterial and irrelevant.)

A. We exercise our judgment in such matters according to circumstances.

58 X Q. According to what circumstances?

(Same objection.)

A. According to time between each shipment, season of the year, our knowledge of the manufacture, and other facts incidental to the business.

59 X Q. Are there not many times when you brand a flour when you have no sample on hand?

(Same objection.)

A. Not to my knowledge.

60 X Q. If you always have samples on hand why do you not always compare them?

(Same objection.)

A. I have already answered that question.

61 X Q. Do I understand you that you do or that you do not invariably compare samples with the flour you brand "La Favorita?" I now ask you again whether you invariably compare such samples with the flour you brand "La Favorita."

(Same objection; also as calling for a conclusionon the part of witness.)

A. I do not understand the question or what samples are referred to.

62 X Q. You have sworn that you keep on hand samples of flour with which to compare flour that you brand "La Favorita?"

64 (Same objection.)

A. We compare all flour branded "La Favorita" with the standard for that brand, excepting, as before stated, when circumstances make us think it unnecessary.

63 X Q. What do you mean by the word "standard" in the last answer?

(Same objection.)

A. The quality of flour with which the brand is associated and which buyers expect to receive.

64 X Q. Is the standard, then, that you refer to a matter of recollection and judgment or matter of physical comparison?

(Same objection is renewed by complainants' counsel, and the attention of the court again directed to the fact that the whole line of examination is unjust to the witness and profitless to the defendants.)

A. It is a matter of expert knowledge fortified by comparison when necessary; cannot be more closely defined.

65 X Q. Were these samples always kept on hand during the time Oscar Ryder was a member of the firm?

(Same objection.)

A. I think so, but am not able to tell of my personal knowledge.

66 X Q. Could there have been another way of determining the standard at that time?

(Complainants' counsel renews the objection already made.)

A. I am not aware of any other.

67 X Q. If the time between shipments of "La Favorita" flour is a long period, do you mean that you do not make a physical comparison of the flour with a sample on hand?

(Same objection.)

65 A. I have not so stated.

68 X Q. What do you mean by your answer, according to time between each shipment?

(Same objection.)

A. Exactly opposite to what the counsel supposes; that if the time between shipments were very short, say between morning and afternoon or one day and the next, I might or might not consider it necessary to make physical examination of each parcel.

69 X Q. And what do you mean by season of the year in reference to this comparison?

(Same objection.)

A. That certain seasons of the year flour requires much more rigid examination than others.

70 X Q. And what do you mean by your knowledge of the manufacture in reference to the comparison?

(Same objection.)

A. That in flour, as in all other lines of business, the integrity and fair dealing of people differ.

71 X Q. Do I understand that if any manufacturer of flour of known integrity who has sent you before flour that you branded as "La Favorita" should send you flour again that you would not think it necessary to examine this flour before again branding it "La Favorita?"

A. I have not so stated.

72 X Q. Please answer, then, the question, and what do you mean by "your knowledge of the manufacture?"

(Same objection.)

A. That in case similar to the one named in previous question that our examination would be much less rigid.

66 73 X Q. Are there any manufactures of flour whose products you would not inspect?

(Same objection.)

A. I think there are.

NEW YORK, *January* 16, 1883—3 o'clock p. m.

Met pursuant to adjournment.

Present: Counsel for respective parties.

The redirect examination of Mr. LEONARD J. BUSBY by ROWLAND COX, Esq.:

74 Re-D. Q. Do you know of any instance where flour branded "La Favorita" has been sold without its having been examined by your firm or some member of it?

A. I do not.

75 Re-D. Q. What do you mean, then, by the statement that you think there are manufacturers of flour whose products you would not inspect?

A. That we are the agents of a large number of mills in the proprietors of which we have great confidence, and, while such a case has not occurred, we would not like to say that we would trust none of them in case of necessity.

76 Re-D. Q. Please say, if you know, whether the firm of Holt & Company have ever assented to the use of the words "La Favorita" by S. Oscar Ryder or any other person.

A. To the best of my knowledge and belief, decidedly not.

77 Re-D. Q. Please let me understand more fully what you mean by the last answer.

A. That not only has the firm not assented to any infringement of their rights, but have always claimed their full rights and ownership.

78 Re-D. Q. Has the firm or any of its members ever, to
67 your knowledge, admitted that any other firm or person had a right to use the words "La Favorita" on flour?

A. I am quite positive they have not.

79 Re-D. Q. If any such admissions had been made would you know of them?

A. I should.

NEW YORK, *January* 23d, 1883—3 o'clock p. m.

Met pursuant to adjournment.

Present: Counsel for respective parties.

The cross-examination of Mr. LEONARD J. BUSBY resumed by J. H. HULL, Esqr.:

74 X Q. Question 50 on cross-examination again put to witness: "How is Miranda milled?"

(The same objection by complainants' counsel to be continued without repetition.)

A. Usually by the roller method.

75 X Q. And is that different from the process used in milling "La Favorita?"

A. Yes; "La Favorita" being usually milled by stones.

Question 55 on cross-examination again put to the witness:

76 X Q. "From what mills have you taken samples for this purpose?"

A. It is difficult to give an exact answer to that question, most of our purchases being made not from the mills, but from the agents of the various mills, who rarely give us the names of the manufacturers.

77 X Q. Then, the samples that you took were taken irrespective of their being any special mill's manufacture?

A. That is correct.

68 Redirect resumed by R. COX, Esq.:

(Complainants' counsel not waiving objections heretofore made.)

78 Re-D. Q. You are aware of the fact that it has been testified in this case that several parties have used the word "La Favorita" on flour not of your selection?

A. I am.

79 Re-D. Q. Have any of such parties been authorized to use the brand?

A. None whatever.

80 Re-D. Q. Have you objected to their using it?

A. In the case of every party.

81 Re-D. Q. What do you mean by every party?

A. Each party of whose use of the brand we have known or been informed.

82 Re-D. Q. Are you able to give the exact date of the conversation referred to in question 11?

A. To the best of my knowledge and recollection it was the last business day of his connection with Holt & Company.

Recross by J. H. HULL, Esq.:

83 Re-X Q. At what times did you give notice of your objection to the use of the brand "La Favorita" by S. Oscar Ryder?

(Objection by complainants' counsel as before.)

A. I think in February, 1871.

84 Re-X Q. Did you give it personally; and, if so, to whom?

A. I did, to Mr. Ryder, personally.

85 Re-X Q. State the conversation.

A. I was entrusted with a check to pay over to Mr. Ryder, being his share of some accounts unclosed at the time of his withdrawal and which had been since collected. I cannot remember the exact words of the conversation, but remember his expressing his
69 regret that anything had occurred to sever our friendly relations, to which my answer was, without attempting to name the exact words, that the only reason why the friendly relation was impossible was that he had violated his promise in regard to our brands, and that his use of them, if not stopped, would prevent any friendship, and possibly cause further trouble. His answer was that Holt & Company had attempted to persecute him and that he felt himself justified in retaliating. I wish to say that my recollecttion is of the general purport of his answer, not attempting to give the exact words.

86 Re-X Q. Where and in whose presence did this conversation occur?

A. On the floor of the exchange. I am not aware that any one was present besides ourselves.

87 Re-X Q. Were you in the habit of taking checks to him on the floor of the exchange?

A. I think I did in one other instance.

88 Re-X Q. Did he give you a receipt for this check?

A. He did.

89 Re-X Q. Was that on a printed form or in writing?

A. In writing.

90 Re-X Q. In a book or a slip of paper?

A. On a slip of paper.

91 Re-X Q. Where did he get the slip of paper from?

A. I think the receipt was written in our office and that I handed it to him with the check for his signature.

92 Re-X Q. Have you the receipt and check in the possession of your firm now?

A. I think we have the receipt; the check I am very doubtful about.

93 Re-X Q. Will you produce the receipt?

A. I will do so if it can be found.

94 Re-X Q. Did you ever give any other notice to S. Oscar Ryder of your objections?

70 A. I think we did.

95 Re-X Q. When was this?

A. I cannot give the time.

96 Re-X Q. Can you say who gave it or where it was given?

A. To the best of my recollection it was given through our bookkeeper.

97 Re-X Q. Is he dead?

A. He is now dead.

98 Re-X Q. When did you give any notice of your objections to the use of the brand "La Favorita" to any other parties?

A. I cannot give exact dates.

99 Re-X Q. Give as near as you can.

A. To Robinson, I think, about five years ago. To Rowland I have spoken two or three times within the last five years.

100 Re-X Q. When for the first time to Rowland?

A. I cannot give any accurate date. To Austin, Nichols and Company during the past year, and to Hecker at the same time.

101 Re-X Q. Do you recollect giving any other notices than those you have referred to?

A. We have published for several years in various papers circulating in the West Indies *fac-similes* of our brand, a statement of our rights, and warning against imitations, and during the past year sent a general circular letter to all parties we thought of as interested, calling attention to our rights and ownership and warning against infringement.

102 Re-X Q. Did you send this notice to any of the parties you have named?

A. I think we sent it to all of them.

103 Re-X Q. Did you send it personally?

A. I think they were sent during my absence from the city.

104 Re-X Q. Then all you know about it is that somebody told you it had been sent?

A. My partners so told me.

105 Re-X Q. And did either of them tell you it had been sent to S. Oscar Ryder?

71 A. I understood fully that a notification was sent to S. Oscar Ryder or to A. V. Ryder, in whose name the business at present stands.

106 Re-X Q. In the notice you say was given to Austin, Nicholls & Company, in what manner was it given—by whom personally and to whom personally?

A. It was given by me, personally, to Mr. R. F. Austin, verbally.

107 Re-X Q. In the instance of Robinson by whom personally; to whom personally?

A. Notice was given to Robinson several times; at least two or three times by me personally; later by a written notification; still

later, to the best of my knowledge and belief, by a copy of the circular letter heretofore referred to.

108 Re-X Q. In the instance of Rowland to whom personally?

A. Samuel Rowland, the junior member of the firm.

109 Re-X Q. In the instance of Hecker by whom personally and to whom personally?

A. To Mr. George B. Hecker personally by Mr. Holt and myself.

110 Re-X Q. Have you ever commenced any legal proceedings against any of these parties except Ryder?

A. I am unable to answer that question.

111 Re-X Q. So far as you know, have any been commenced?

A. I am unable to answer the previous question, from the fact that I am not fully advised as to the full meaning of taking legal steps.

112 Re-X Q. Have any suits been commenced against any of them?

A. I think my counsel has in his possession papers in reference to suits against other parties; but, of my own knowledge, I do not know what, if any, steps have been taken.

72 (Complainants' counsel renews objections heretofore made to all the testimony relating to the use of the brand "La Favorita" by other persons than S. Oscar Rider on the ground that it is immaterial and irrelevant and affects no issue in the case, and because the evidence tends to establish a foundation for a defence that is contrary to those set up in the answer; and the testimony relating to the use of the brand by Ryder is objected to as immaterial and irrelevant, this objection to apply to all questions and answers that involve the proof of the facts objected to.)

Redirect by ROWLAND COX, Esq.:

114 Re-D. Q. Please give us the dates in each instance when it came to your knowledge that the brand "La Favorita" was being used by the parties referred to in your cross-examination and how long after the receipt of such knowledge you notified them of your rights. You need not answer in regard to Ryder.

A. I cannot give the exact dates more closely than I have given in describing the notification. In each case, I believe, we notified the parties immediately upon our becoming aware of their action.

115 Re-D. Q. Please state, if you are able to do so, whether the sales of flour under the "La Favorita" brand by the parties referred to in your cross-examination have been large or small.

A. I cannot answer that question accurately, as our means of determining the amount of sales of the imitations is difficult; but my belief is, from all information that I have acquired, that their aggregate is comparatively small in comparison with the whole business of that brand.

116 Re-D. Q. Please give me your best judgment as to the aggregate of the sales of the imitations made by the parties referred
73 to you in your cross-examination, including them all, when compared with the sales of the article selected by Holt & Company.

(Objected to on the ground of being immaterial and incompetent.)

A. To the best of my judgment I should not say over one-quarter.

117 Re-D. Q. You mean, I understand, that you think there is four times as much of the "La Favorita" of Holt & Company sold as of the imitation articles?

A. I should think so; from three to four times.

118 Re-D. Q. For how long a period has this been true?

(The same objection.)

A. That is a difficult question to answer. The amount of the imitations having increased within the last few months, I should say that the proportion of the genuine article was still larger previously.

LEONARD J. BUSBY.

NEW YORK, *March* 6, 1883—11 o'clock a. m.

Met pursuant to agreement.

Present: Counsel as before.

JEROME B. WHEELER, a witness called on the part of the complainants, having been duly sworn, testifies as follows in answer to questions propounded by Mr. Cox:

1 Q. What is your name, age, residence, and occupation?

A. My name is Jerome B. Wheeler; I am 40 years old; I reside at 47 East Fifty-seventh street, New York city, and am by occupation a dry-goods merchant.

74 2 Q. Were you ever connected with the firm of Holt & Company, the complainants in this case?

A. I formed a copartnership with Holt & Company February 1st, 1878, and withdrew from the firm April 1st, 1879.

3 Q. Had you been connected with the firm of Holt and Company prior to 1878?

A. I was employed with the firm as salesman February 1st, 1869.

4 Q. That was immediately after S. Oscar Ryder retired from the firm, was it not?

A. To the best of my knowledge and belief it was.

5 Q. How long after February, 1869, did you continue in the employ of Holt & Company, the complainants?

A. Until February 1st, 1878.

6 Q. What were your duties during the year 1869 and immediately thereafter?

A. Salesman on 'change.

7 Q. Were your duties during 1869 and immediately thereafter such that they required you to keep yourself informed as to the different brands in the market?

A. Yes.

8 Q. Do you know whether S. Oscar Ryder used the brands of Holt & Company immediately after his retirement from the firm?

A. Yes, sir.

9 Q. Please state when, to your knowledge, he first used the brands of Holt & Company.

A. During the year 1869 and subsequently.

10 Q. What brand or brands did he use, if you know?

A. "La Selecta" and "La Favorita."

11 Q. When and under what circumstances did you first learn of his having used the brand "La Selecta?"

A. Some time during the year 1869 I was informed by Robert S. Holt that S. Oscar Ryder was making the brand "La Se-
75 lecta" and was about to make a shipment of same, and he directed me, in company with the porter, to go to the wharf and see if said shipment was made, which I did, and saw the said brand unloaded and part of it loaded on a vessel.

12 Q. At what hour were these goods referred to in your last answer delivered for shipment?

A. About 6.30 p. m.

13 Q. Was that a usual or an unusual hour to make a shipment of flour?

A. An unusual hour.

14 Q. Have you any recollection of being present at any meeting of the complaint committee of the produce exchange at which S. Oscar Ryder was present and testified concerning this use of the brand "La Selecta?"

A. I have.

15 Q. Please say when and what you heard Mr. Ryder state.

A. In the year 1869 S. Oscar Ryder stated that this complaint was brought by Holt and Company only with a view to drive him off the exchange; that the brand "La Selecta" was his property, as he had purchased it from the executor.

16 Q. You are positive that you heard S. Oscar Ryder make the statement set forth in your last answer?

A. Yes.

17 Q. Do you know whether he had been sworn and was testifying under oath?

A. He had not.

18 Q. Did you attend all the meetings of the complaint committee while it had the matter of complaint of Holt and Company under consideration?

A. No.

19 Q. Then you only heard part of the testimony?

A. Only a part of it.

20 Q. When did you first hear of S. Oscar Ryder making use of the brand La Favorita?

A. To the best of my belief in the fall of 1869 or the spring of 1870.

76 21 Q. Do you know whether S. Oscar Ryder originated and used any brands immediately after his retirement from the firm of Holt & Company?

A. I do.

22 Q. Please state what brands you know of his having originated and used just after leaving the firm of Holt & Company.

A. I know of two—"La Union" and "Southern Belle."

23 Q. Have you any knowledge of his having sold flour under the brand "La Perla?"

A. I have not.

24 Q. Did he use the two brands you have mentioned before he began to use "La Selecta?"

A. To the best of my knowledge and belief, he did.

25 Q. Do you know whether immediately after his retirement from the firm of Holt & Company S. Oscar Ryder competed with Holt & Company for their trade?

A. I do.

26 Q. Do you know whether he used the two brands you mentioned in his efforts to secure the trade of Holt & Company's customers?

A. I do.

27 Q. Do you mean to say he did use them?

A. Yes, sir.

28 Q. In what way? Please explain.

A. In competition with the brands then in use by Holt & Company.

Counsel does not cross-examine.

J. B. WHEELER.

77 EXHIBITS.

COMPLAINANTS' EX. A. Oct. 31, 1882. J. A. S., Ex'r.

THE UNITED STATES OF AMERICA:

U. S. Circuit Court.

ROB'T S. HOLT *et al.*
vs.
JOSE MENENDEZ *et al.* } No. 9144.

To all to whom these presents shall come:

This is to certify that by the records of the United States Patent Office it appears that Holt & Co., of New York, New York, did, on the 17th day of October, 1881, deposit in said office for registration *fac-similes* of a certain trade-mark for flour, and the date of the receipt thereof was duly noted and recorded; that on the 17th day of October, 1881, they deposited therewith a statement and a written declaration under the oath of Chas. W. McCutchen, a member of said firm. Copies of said statement and of a subsequent declaration filed January 28, 1882, are hereto annexed; and the said firm having made the payment of a fee of twenty-five dollars and complied with the regulation in such cases prescribed by the Commissioner of Patents, and in all other respects complied with an act of Congress approved March 3, 1881, entitled "An act to authorize the reg-

istration of trade-marks and protect the same," the said *fac-similes*, statement, and declaration were duly recorded, and the said trade-
mark has been duly registered in the said Patent Office this 28th
78 day of February, one thousand eight hundred and eighty-two, and protection therefor will remain in force for thirty years from said date, unless sooner terminated, in accordance with section 5 of said act.

In testimony whereof the seal of the Department of the Interior is hereto affixed this twenty-eighth day of February, 1882, and of the Independence of the United States the one hundred and sixth.

Given under my hand at Washington, D. C.

[L. S.]

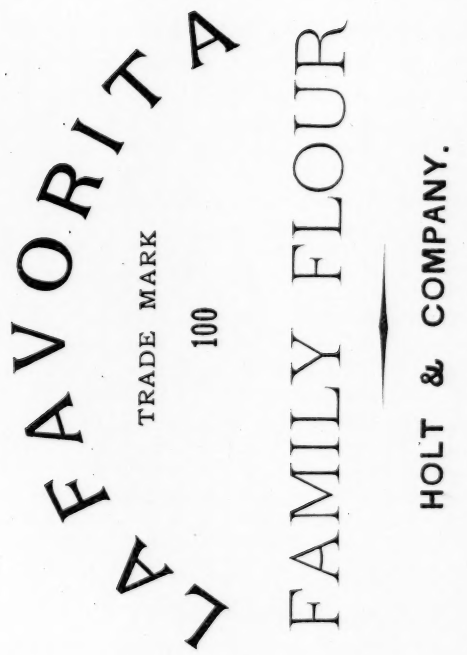
E. M. MARBLE,
Commissioner of Patents.

79 TRADE MARK.

HOLT & CO.

FLOUR.

No. 9,144. Registered Feb. 28, 1882.



HOLT & CO.,
Per LEMUEL W. SERRELL, *Attorney.*

Witnesses:
CHAS. H. SMITH.
HAROLD SERRELL.

7—342

80 UNITED STATES PATENT OFFICE.

HOLT & Co., of New York, N. Y.

Trade-Mark for Flour.

Statement and declaration of trade-mark No. 9144, registered February 28, 1882; application filed October 17, 1881.

Statement.

To all whom it may concern:

Be it known that we, Holt & Co., a firm doing business at New York, in the State of New York, have adopted for our use a trade-mark for flour, of which the following is a full, clear, and exact specification:

Our trade-mark consists of the words "La Favorita." This has generally been used, as represented in the accompanying *fac-simile*, in connection with the firm name and words or marks indicating the quality or quantity of the article, but these may be omitted, or some other words or device may be substituted, without materially changing the character of our trade-mark, the essential feature of which is the words "La Favorita."

This trade-mark has been used by the said firm continuously in their business since 1861, but some of the present members of said firm were not in the same when the trade-mark was first used.

The class of merchandise to which the trade-mark is appropriated is flour, and the particular description of goods upon which we use the said trade-mark is flour. It has been our custom to print or stencil the same upon bags, barrels, half-barrels, quarter-
81 barrels, and packages containing the flour, and also to print or stencil it upon labels to be pasted upon the bags, barrels, or packages of flour.

Signed by us this 17th day of June, A. D. 1881.

HOLT & COMPANY,
By C. W. McCUTCHEN.

Witnesses:
HAROLD SERRELL.
GEO. T. PINCKNEY.

Declaration.

STATE OF NEW YORK, }
County of New York, } *ss:*

Charles W. McCutchen, being duly sworn, deposes and says that he is a member of the firm of Holt and Company, the applicants named in the application No. 13619, filed October 17, 1881, for registration of trade-mark; that he verily believes that the statement therein contained is true; that the said firm of Holt and Company has at this time a right to the use of the trade-mark therein de-

scribed; that no other person, firm, or corporation has the right to such use, either in the identical form or in any such near resemblance thereto as might be calculated to deceive; that it is used in commerce with the Spanish West Indies and other foreign countries; that the description and *fac-similes* presented for record truly represent the trade-mark sought to be registered, and that he and all the other members of said firm are citizens of the United States.

CHAS. W. McCUTCHEN.

Sworn to and subscribed before me this 26th day of January, A. D. 1882.

[L. S.]

S. H. GRANT,
Notary Public, City and County of New York.

82 COMPLAINANTS' EX. B. Oct. 31st, 1882. J. A. S., Examiner.

U. S. Circuit Court.

ROBERT S. HOLT *et al. vs.* JOSE MENENDEZ *et al.*

(2-175.)

DEPARTMENT OF THE INTERIOR,
UNITED STATES PATENT OFFICE.

To all persons to whom these presents shall come, Greeting:

This is to certify that the annexed is a true copy from the records of this office of the trade-mark registered by Holt & Co., through Chas W. McCutchen, a member of said firm, February 28th, 1882, No. 9144, for flour.

In testimony whereof I, E. M. Marble, Commissioner of Patents, have caused the seal of the Patent Office to be affixed this 21st day of October, in the year of our Lord one thousand eight hundred and eighty-two, and of the Independence of the United States the one hundred and seventh.

[L. S.]

E. M. MARBLE,
Commissioner.

83 No. 9144.

THE UNITED STATES OF AMERICA:

To all to whom these presents shall come:

This is to certify that by the records of the United States Patent Office it appears that Holt & Co., of New York, New York, did on the 17th day of October, 1881, deposit in said office for registration *fac-similes* of a certain trade-mark for flour, and the date of the receipt thereof was duly noted and recorded; that on the 17th day of October, 1881, they deposited therewith a statement and a written declaration, under the oath of Charles W. McCutchen, a member of said firm; copies of said statement and of a subsequent declaration filed January 28th, 1882, are hereto annexed, and the said firm having made the payment of a

fee of twenty-five dollars and complied with the regulations in such cases prescribed by the Commissioner of Patents and in all other respects complied with an act of Congress approved March 3, 1881, entitled "An act to authorize the registration of trade-marks and protect the same," the said *fac-similes*, statement, and declaration were duly recorded, and the said trade-mark has been duly registered in the said Patent Office this 28th day of February, one thousand eight hundred and eighty-two, and protection therefor will remain in force for thirty years from said date, unless sooner terminated in accordance with section 5 of said act.

In testimony whereof the seal of the Department of the Interior is hereto affixed this twenty-eighth day of February, 1882, and of the Independence of the United States the one hundred and sixth.

Given under my hand at Washington, D. C.

[L. S.]

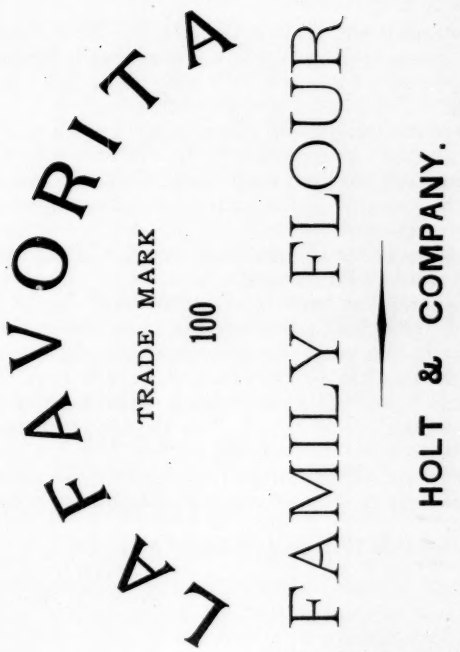
E. M. MARBLE,
Commissioner of Patents.

84 TRADE MARK.

HOLT & CO.

FLOUR.

No. 9144. Registered Feb. 28, 1882.



HOLT & CO.,
Per LEMUEL W. SERRELL,
Attorney.

Witnesses:
CHAS. H. SMITH.
HAROLD SERRELL.

85 UNITED STATES PATENT OFFICE.

HOLT & Co., of New York, N. Y.

Trade-mark for Flour.

Statement and declaration of trade-mark No. 9144, registered February 28, 1882; application filed October 17, 1881.

Statement.

To all whom it may concern:

Be it known that we, Holt & Co., a firm doing business at New York, in the State of New York, have adopted for our use a trade-mark for flour, of which the following is a full, clear, and exact specification.

Our trade-mark consists of the words "La Favorita." This has generally been used, as represented in the accompanying *fac-simile*, in connection with the firm name and words or marks indicating the quality or quantity of the article; but these may be omitted or some other words or device may be substituted without materially changing the character of our trade-mark, the essential feature of which is the words "La Favorita."

This trade-mark has been used by the said firm continuously in their business since 1861; but some of the present members of said firm were not in the same when the trade-mark was first used.

The class of merchandise to which the trade-mark is appropriated is flour, and the particular description of goods upon which we use the said trade-mark is flour. It has been our custom to print or stencil the same upon bags, barrels, half barrels, quarter bar-
86 rels, and packages containing the flour, and also to print or stencil it upon labels to be pasted upon bags, barrels, or packages of flour.

Signed by us this 17th day of June, A. D. 1881.

HOLT & COMPANY,
By C. W. McCUTCHEN.

Witnesses:
HAROLD SERRELL.
GEO. T. PINCKNEY.

Declaration.

STATE OF NEW YORK, }
County of New York, } ss:

Charles W. McCutchen, being duly sworn, deposes and says that he is a member of the firm of Holt & Company, the applicants named in the application No. 13619, filed October 17, 1881, for registration of trade-mark; that he verily believes that the statement therein contained is true; that the said firm of Holt & Company has at this time a right to the use of the trade-mark therein de-

scribed; that no other person, firm, or corporation has the right to such use, either in the identical form or in any such near resemblance thereto as might be calculated to deceive; that it is used in commerce with the Spanish West Indies and other foreign countries; that the description and *fac-similes* presented for record truly represent the trade-mark sought to be registered, and that he and all the other members of said firm are citizens of the United States.

CHAS. W. McCUTCHEN.

Sworn to and subscribed before me this 26th day of January, A. D. 1882.

[L. S.] S. H. GRANT,
Notary Public, City and County of New York.

87 DEFENDANT'S EXHIBIT B. NOV. 23, 1882. J. A. S., Ex'r.

NEW YORK PRODUCE EXCHANGE,
NEW YORK, *Aug't* 13, 1869.

Messrs. Holt & Company.

GENTLEMEN: Herewith I hand you extract from minutes of board meeting held August 12th, 1869.

The following resolution was unanimously adopted:

Resolved, That the board consider the proceedings of Messrs. Rowland & Ryder in the case complained of by Messrs. Holt & Company "inconsistent with those just and equitable principles of trade" which ought to govern the transactions of the members of the produce exchange with each other.

Resolved, That a copy of the foregoing resolution be sent by the secretary *pro tem.* to each of the parties in the complaint.

D. A. ELDEDGE,
Sec'y pro tem.

DEFENDANT'S EXHIBIT A. NOV. 23, '82.

This agreement, made this twenty-fifth day of January, A. D. one thousand eight hundred and sixty-one, between Robert S. Holt, party of the first part; Stephen G. Searls, party of the second part, and S. Oscar Ryder, party of the third part, witnesseth:

That the said parties mutually agree with each other to form a copartnership under the following articles:

1st. The business shall be that commonly known as the flour and commission business, and shall be conducted in the city of New York under the firm name of Holt & Company, and shall continue for the term of three years from and after the first day of February, A. D. one thousand eight hundred and sixty-one.

88 2nd. The parties hereto shall respectively contribute as their portions of the capital as follows, viz.:

Robert S. Holt and Stephen G. Searls, the parties of the first and second parts aforesaid, shall contribute the balances which shall appear to the credit of their respective accounts on the books of the

former firm of Holt & Company upon the balancing of such books on the first day of February, one thousand eight hundred and sixty-one, and S. Oscar Ryder, party of the third part, shall contribute the sum of five thousand dollars in cash on the first day of February, one thousand eight hundred and sixty-one, and, should he desire to do so, a like sum of five thousand dollars within one year thereafter.

3d. The losses and profits shall be shared and apportioned one-half to Robert S. Holt, three-tenths to Stephen G. Searls, and two-tenths to S. Oscar Ryder, and the partners shall devote their time and best efforts to the business of the firm.

4th. Each partner shall be entitled to interest on any amount contributed by him to the capital from the time it is contributed, yearly, the same to be credited to him at the end of each year and accumulated, and each shall be entitled to interest yearly on such portion of his share of the profits as he shall not have drawn out during the year, to be computed from the time when the same shall be credited to him and accumulated. The partnership accounts and statements shall be made up to the first day of February in each year.

It is expressly agreed that neither partner shall lend or use the name, credit, or means of the firm excepting in its own legitmate operations, and under no circumstances whatever shall the name or credit of the firm be loaned or exchanged with any other person or firm, nor shall either party be interested or concerned in any other business or business operations, nor separately lend his own name or credit to any other person unless the written consent of his co-partners be first had and obtained.

89 And the parties bind themselves to keep and perform these articles in good faith and be true to each other.

In witness whereof the parties to these presents have hereunto set their hands and seals the day and year first above written.

ROBERT S. HOLT. [SEAL.]
STEPHEN G. SEARLS. [SEAL.]
S. OSCAR RYDER. [SEAL.]

Sealed and delivered in presence of—
GEO. A. CURTIS.

DEFENDANTS' EXHIBIT No. 1. December 1, 1882. J. A. S., Ex'r.

Articles of copartnership, dated 15th January, 1869, between Robert S. Holt and Stephen G. Searls; period, three years from February 1st, 1869.

"It is understood and agreed by and between the parties hereto that this agreement may be terminated by either party by giving thirty days notice in writing, and upon the termination of this agreement, either by notice as aforesaid or by the terms thereof, the good will of the business and the right to liquidate the affairs of the said copartnership shall belong to the said Robert S. Holt." In other

respects this exhibit is in the form of Exhibit A above. It contains the following renewal:

"NEW YORK, *February 1st*, 1872.

"The foregoing agreement of copartnership is hereby renewed and continued for one year from this date."

ROBERT S. HOLT. [SEAL.]
STEPHEN G. SEARLS. [SEAL.]

In presence of—
LEONARD J. BUSBY.

DEFENDANTS' EXHIBIT No. 2. Dec. 1, 1882. J. A. S., Ex'r.

Articles of copartnership, dated 22d January, 1873, between Robert S. Holt, Stephen G. Searls, and Leonard J. Busby; period, two years from February 1st, 1873.

This exhibit is in general form similar to Exhibit A above, but contains agreement similar to that in Exhibit No. 1 above, reciting that on dissolution good will and right to liquidate shall reside in Robert S. Holt.

Contains also following renewal:

"By mutual agreement these articles of copartnership are continued for one year from this date.

New York, February 1st, 1875.

ROBERT S. HOLT. [SEAL.]
STEPHEN G. SEARLS. [SEAL.]
LEONARD J. BUSBY. [SEAL.]

Sealed and delivered in presence of—
J. B. WHEELER.
P. H. MAISON.

DEFENDANTS' EXHIBIT No. 3. Dec. 1, 1882. J. A. S., Ex'r.

Articles of copartnership, dated 7th January, 1876, between Robert S. Holt, Stephen G. Searls, and Leonard J. Busby; period, one year from February 1st, 1876.

This exhibit is in general form similar to Exhibit "A," but contains agreement that on dissolution the good will and right to liquidate shall reside in Robert Holt.

This exhibit contains following renewal endorsed thereon:

"The copartnership under the within articles having been
91 terminated by the death of Mr. Stephen G. Searls on July 7, 1876, the surviving partners, Robert S. Holt and Leonard J. Busby, mutually agree to and with each other to continue the business until February 1, 1877, under all the articles and agreements herein contained, except such as relate to the said Stephen G. Searls, and that the distribution of the profits of the business for the said

term of six months shall be as follows, viz., two-thirds to Robert S. Holt, one-third to Leonard J. Busby.

Witness our hands and seals this first day of August, eighteen hundred and seventy-six.

ROBERT S. HOLT, [SEAL.]
LEONARD J. BUSBY. [SEAL.]

In presence of—
RALPH T. COOK,
ROBERT S. HOLT, JR.

Said exhibit contains also renewal for one year from 31 January, 1877.

DEFENDANTS' EXHIBIT No. 4. Dec. 1, 1882. J. A. S., Ex'r.

Articles of copartnership, dated 31 January, 1878, between Robert S. Holt, Leonard J. Busby, and Jerome B. Wheeler; period, three years from February 1st, 1878.

This exhibit is in general form similar to Exhibit A, but contains agreement that in dissolution the good will and right to liquidate shall reside in Robert S. Holt.

This exhibit contains following endorsements:

"NEW YORK, *April 1st*, 1879.

"By mutual consent, Jerome B. Wheeler withdraws this day from the firm of Holt & Company, and the articles of
92 copartnership hereto attached are cancelled as far as they relate to him.

"ROBERT S. HOLT. [SEAL.]
"LEONARD J. BUSBY. [SEAL.]
"JEROME B. WHEELER." [SEAL.]

Witnesses:
P. H. MAISON.
R. S. HOLT, JR.

NEW YORK, *April 1st*, 1879.

The remaining partners, Robert S. Holt and Leonard J. Busby, hereby agree to continue the business of Holt & Company under the same firm name and under the annexed articles of copartnership, except as far as the latter relate to Jerome B. Wheeler. The share of the profits and losses of the business which was allotted to said Jerome B. Wheeler up to the time of his withdrawal, viz., twenty per centum, to be equally divided for the future between said remaining partners additionally to the percentages designated to them in the original articles.

ROBERT S. HOLT. [SEAL.]
LEONARD J. BUSBY. [SEAL.]

Witnesses:
P. H. MAISON.
R. S. HOLT, JR.

DEFENDANTS' EXHIBIT. Dec. 5, 1882. J. A. S., Examiner.

Articles of copartnership, dated May 1st, 1879, between Robert S. Holt, Leonard J. Busby, and Charles W. McCutchen; period, two years and nine months from May 1st, 1879.

This exhibit in general form is similar to Exhibit "A," but contains agreement that upon dissolution or termination the good will and right to liquidate shall belong to Robert S. Holt.

There is endorsed in said articles the following renewal:

93 It is agreed that the partnership, which will expire on the first day of February, eighteen hundred and eighty-two, by limitation contained in articles annexed hereto, shall be continued on the same terms for the further term of three years, namely, from the above-named date to the first day of February, eighteen hundred and eighty-four, subject to all the provisions and restrictions therein contained, except that in the articles relating to the termination of the partnership, &c., the mutual understanding is added that in the event of its occurring by the death of either partner the liquidation shall be made by the surviving partners.

In witness whereof we have hereto affixed our hands and seals this thirtieth day of January, eighteen hundred and eighty-two.

ROBERT S. HOLT. [SEAL.]
LEONARD J. BUSBY. [SEAL.]
CHARLES W. McCUTCHEN. [SEAL.]

In witness of—
C. M. BALDWIN.

DEFENDANTS' EXHIBIT D. Dec. 14, 1882. J. A. S., Ex'r.

JULY 20, 1869.

Committee met at exchange rooms, 13 Moore street, 1¼ p. m.
Present: Oakley, Laimbeer, and Baxter; Oakley, chairman.
R. S. Holt, plaintiff, presented following complaint:

"We complain of Messrs. Rowland & Ryder, No. 67 Front St., New York, for counterfeiting a brand of flour owned and used by us as a trade-mark. This being not done inadvertently, but said firm having been aware that we claimed that, with several other brands, as trade-marks, they having also admitted such claim, and

94 both the individuals composing such firm having promised to refrain from using any of said brands, we claim that their conduct is 'in violation of just and equitable principles of trade,' and we present this complaint as a matter of discipline under art. II, section 3, of the by-laws of the exchange."

Mr. Ryder appeared on part of defendants and denied allegations, and, after some discussion and interchange of views, it was agreed to adjourn until Wednesday, 28th inst.

JULY 28TH, 1869.

Complaint committee met at rooms, on complaint of Holt and Company *vs.* Rowland & Ryder.

Committee all present.

Mr. Holt presented two witnesses to substantiate their claim that the uninterrupted use of the brand in question, having rested in them for three years, gave them the sole right to its use as a trade-mark.

Rowland & Ryder, denying said claim, requested an adjournment to enable them to present evidence to the contrary.

Adjourned to 30th inst.

Adjourned Meeting of Complaint Committee, Held at Exchange Rooms, 13 Moore St.

JULY 30TH, 1869.

After having heard the testimony presented by both parties, the parties retired and the committee made the following proposition and suggestions to the parties for their consideration as a basis of settlement, viz:

The complaint committee, having heard parties and evidence in above case, have come to the following conclusions thereto:

First. The complaint against Rowland and Ryder for counterfeiting a brand is unsustained by the evidence.

95 Second. In view of the fact that it was known to Rowland and Ryder that Holt & Company claimed to be the owners of the brand of flour "La Selecta," and of the circumstances occurring at the time Mr. Ryder left Holt and Company, it was the duty of the former firm to have apprised the latter of any intention to have used said brand, and that to the extent that this has not been done Holt & Company have just cause of complaint against Rowland & Ryder.

Third. Rowland and Ryder having, since the complaint in this case was made, purchased an alleged right of another party to use said brand, it be, and it is hereby, suggested to both parties that all complaint as to the past be withdrawn by Holt & Company, and that the question of who is now and henceforward to have the privilege of exclusively using said brand be referred to the arbitration committee or to any arbiter mutually chosen, whose decision both parties shall bind themselves to abide by.

Fourth. That on both parties notifying chairman of committee of acquiescence in the foregoing suggestion, say not later than Tuesday, 3d prox., the chairman shall be relieved of the duty of reporting this case to the regular meeting of board of managers, 5th prox.

Fifth. That a copy of this document be sent to each party concerned.

Regular Meeting Board of Managers.

AUGUST 5, 1869.

Present: Harrison, Bogert, Baxter, Hyatt, Boynton, Laimbeer, Parish, Caleb, and Oakley.

Report complaint committee.

Case Holt & Company *v.* Rowland & Ryder stated and parties are recommended to be heard by full board. Parties notified to appear 12th inst., 2½ p. m.

96 *Adjourned Meeting Board of Managers.*

AUG. 12, '69.

Present: Harrison, Bogert, Eldridge, Baxter, Boynton, Laimbeer, Caleb, and Oakley; Eldridge appointed secretary *pro tem.*

Parties in case of Holt & Company *v.* Rowland & Ryder appeared and presented such evidence as they wished in regard to their respective claims, after which they retired, and, on motion, the following resolution by Mr. Baxter was unanimously adopted:

Resolved, That the board consider the proceedings of Messrs. Rowland & Ryder, in the case complained of by Holt & Company, inconsistent with those just and equitable principles of trade which ought to govern the transactions of merchants of the produce exchange with each other.

Resolved, That a copy of the foregoing resolution be sent by secretary *pro tem.* to each of the parties aforesaid.

97 *Complainants' Rebutting Testimony.*

United States Circuit Court, Southern District of New York.

ROBERT S. HOLT *et al. against* JOSÉ MENDEZ *et al.*

Testimony taken in rebuttal, on the part of the complainants, before John A. Shields, Esq., special examiner, at the office of Rowland Cox, Esq., No. 229 Broadway, New York, June 22, 1883.

Present: Rowland Cox, Esq., and S. St. J. McCutchen, Esq., on behalf of the complainants; John Henry Hull, Esq., on behalf of defendants.

LEONARD J. BUSBY, recalled on the part of the complainants, testified as follows in answer to questions propounded by Mr. Cox:

1 Q. You have been sworn in this case?
A. Yes, sir.
2 Q. And are one of the complainants?
A. I am.

3 Q. Will you please state what your recollection is in regard to a conversation or conversations which you had in or about the year 1878 with George B. Robinson concerning the brand La Favorita? Please give us your recollection in full.

A. I had several conversations with him; the earliest one about that time; about the year 1878. We discovered that he was shipping La Favorita flour after he had been in the habit of purchasing of us, for some time. I visited him and called his attention
98 to the fact of our ownership and used pretty severe language to him in reference to counterfeiting the brand.

4 Q. Did you state to him at any of these conversations that the brand La Favorita was the property of Holt & Co.?

A. Most emphatically.

5 Q. Did you ever state, directly or indirectly, or intimate to him that it was not?

A. Decidedly not.

6 Q. You are postive that you did not?

A. That was the entire object of my visiting him. After that day I talked with him on the subject certainly half a dozen times, at different periods, and in each case most emphatically claimed the ownership of the brand.

7 Q. Are you able to say whether the firm of Holt & Co. have had a knowledge of the name of the person whom it has been said manufactured La Favorita flour at La Porte, Indiana?

A. We have not.

8 Q. What have you known concerning the manufacture of La Favorita flour at La Porte, Indiana?

A. We have known that a brand La Favorita flour has been offered on the exchange for several years, manufactured somewhere in the West. We never had any more definite information about it until the testimony in this suit.

9 Q. Have the kindness to say whether you have examined the books of Holt & Co. with a view to determining whether the brands used prior to the year 1869 have been continued by the firm without exception.

A. I believe we have in every instance, except that of the brand Aurora, which was given to Mr. Ryder at the time of his departure from the firm.

10 Q. The brand Aurora, then, has been an exception?

A. It has; I think the only one. The brand Victoria, named by Mr. Holt, was an error on his part.

99 11 Q. You have, then, packed no flour under the brand Aurora since Mr. Ryder left the firm?

A. Positively not since that time.

Cross-examination by Mr. HULL:

12 X Q. Mr. Busby, have you not corresponded with a Mr. Goddard in reference to the brand La Favorita?

(Objected to as not cross-examination, going outside of the range of the direct.)

A. I have.

13 X Q. State the nature of the correspondence, please.

(Objected to as calling for secondary evidence.)

(Counsel for defendants requests the witness to produce the correspondence on both sides at the next meeting.)

(Complainants' counsel state that, as at present advised, they desire to enter a formal objection, not having any knowledge of the contents of the correspondence, and suggest an adjournment with a view to the production of the correspondence, or a definite objection on the part of the complainants.

100 NEW YORK, *July 9th*, 1883.

Met, pursuant to agreement, at the office of Rowland Cox, Esq., No. 229 Broadway, New York.

Present: Rowland Cox, Esq., on behalf of complainants; John Henry Hull, Esq., on behalf of defendants.

LEONARD J. BUSBY recalled for cross-examination by Mr. HULL.

14 X Q. Have you produced the correspondence called for at the preceding meeting?

Complainants' counsel says: "I have the correspondence in my hand, and, if it is demanded, will produce it under objection. I object to its productian on the ground that it is incompetent, immaterial, and irrelevant, and not within the range of examination-in-chief. I object to it particularly in so far as it may be of a secondary nature. If the correspondence is insisted upon by defendants' counsel, notwithstanding these objections, the witness may produce it."

Defendants' counsel insists upon the production of the correspondence.

A. I produce the correspondence as far as is in my power.

The witness here produced the correspondence and the letters were handed to defendants' counsel.

Defendants' counsel offers in evidence letters dated May 18, 1882, and May 31, 1883, from J. H. Goddard to plaintiffs, and the same are marked "Defendants' Exhibit 1, July 9, 1883, J. A. S., Ex.;" "Defendants' Exhibit 2, July 9, 1883, J. A. S., Ex."

15 X Q. Is this all the correspondence your house had with Goddard?

A. Our house has had no correspondence with him.

101 16 X Q. Why do you say your house has had no correspondence with him?

A. These letters are personal—private letters.

17 X Q. Of whom?

A. Of my own.

18 X Q. Were they not written in reference to copartnership matter?

(Objected to by complainants' counsel on the ground that the letters are the best evidence.)

A. They might be so interpreted.

19 X Q. Were they not written with a knowledge of your firm with reference to inquiries regarding the origin of the brand La Favorita?

A. They were not.

20 X Q. Did your house or any of your partners except yourself know of the letters?

A. They did not at the time they were written.

21 X Q. Have they since known?

A. They have.

22 X Q. Did they not know before the commencement of this suit of the letter of May 18, 1882?

A. I think they did.

23 X Q. Have you, then, had any other correspondence with Mr. Goddard?

A. To answer this question I would explain my first answer where I said I produce the letters "as far as is in my power." My first letter to Mr. Goddard was not copied, and I have been, therefore, unable to produce it. I have had no other correspondence.

24 X Q. Was not the balance of your correspondence with him copied into your firm's letter book?

A. It was not.

25 X Q. What is this letter-press copy taken from?

A. From a private letter book.

26 X Q. Of your own?

A. My own.

102 27 X Q. Have you had any other correspondence with any person or persons relative to the origin of the brand La Favorita?

A. I have had no correspondence in respect to the origin of the brand La Favorita.

28 X Q. Have you had any correspondence similar to this which you have produced with any person or persons, either personal or of your firm?

(Objected to as incompetent.)

A. I have not, to the best of my knowledge.

29 X Q. Do you mean to say that you cannot now tell whether you ever had any correspondence, personally or of your firm, with any person or persons in reference to the brand La Favorita?

A. My belief is that I have not.

30 X Q. Did you never possess any information, direct or indirect, that the brand, trade-mark, or name La Favorita as applied to flour having been used before your firm used it?

(Objected to as not cross-examination and as incompetent.)

A. I have not.

31 X Q. You never heard of such a fact?

A. I never did.

32 X Q. You heard of it, however, in this letter you have produced, did you not?

A. I have read the letter.

33 X Q. Doesn't that so inform you?

A. It makes a statement to that effect.

34 X Q. Did you ever make any inquiries to ascertain the truth of that statement contained in the letter?

A. Never, except what is contained in the correspondence.

35 X Q. Never corresponded with S. G. Sears & Co.?

A. Never.

103 Redirect examination by Mr. Cox:

36 Re-D. Q. How many copies and originals did you produce and hand to defendants' counsel to-day at his request?

A. Two originals and one copy.

37 Re-D. Q. The two originals have been offered in evidence, have they not?

A. Yes, sir.

38 Re-D. Q. The copy (which I now show you) is a copy of an answer to the first of these letters which has been offered in evidence, is it not?

A. To the second.

39 Re-D. Q. An answer to the letter dated May 31, 1883?

A. It is.

(The copy referred to by the witness is offered in evidence by complainants' counsel and marked "Complainants' Exhibit, July 9, 1883, J. A. S., Ex.")

The introduction of the copy referred to is objected to by defendants' counsel as incompetent, immaterial, and secondary evidence.)

40 Re-D. Q. You have not the original of this letter, a copy of which has been offered in evidence, in your possession?

A. I have not.

41 Re-D. Q. Are you able to say whether or not the word "Georgetown" was ever used by the firm of Holt & Company in connection with the brand La Favorita?

A. It was not at any time.

42 Re-D. Q. You are positive of that?

A. Very positive of it.

Recross-examination by Mr. Hull:

43 Re-X Q. What year did you come with Holt & Company?

104 A. In 1862.

44 Re-X Q. What part of the year of 1862?

A. I think it was in June.

L'D J. BUSBY.

Sworn to before me this 10th day of July, 1883.

JOHN A. SHIELDS, *Examiner.*

Adjourned.

DEFENDANTS' EXHIBIT 1. July 9, 1883. J. A. S., Ex.

ST. LOUIS, *May* 18*th*, 1882.

Mr. L. J. Busby, New York.

FRIEND BUSBY: Yours of the 5th received and noted. I have made enquiries and also had our brokers who sell for us on our home market to make enquiries, but thus far have not been successful. I suppose Geo. Bain or rather the Atlantic Mill Co. has that brand, but they do not acknowledge it. I suppose there must be a good many brands by the name "La Favorita." Father says in 1857, when he was with the firm of S. G. Sears & Co. running the Laclede Mills of this city, they had a brand La Favorita. As that mill has changed hands several times suppose that brand remained with the mill. Mr. J. B. M. Kehlor is the present owner of the mill. Who has the control of that brand in New York? Or if you can give me any other points will do all I can at this end to help you. Does this brand arrive in large or small lots? Weather thus far good for the growing crop. My regards to Mr. R. S. Holt.

Your friend, J. H. GODDARD.

105 DEFENDANTS' EXHIBIT 2. July 9, 1883. J. A. S., Ex.

ST. LOUIS, *May* 31, 1883.

FRIEND BUSBY: Haven't heard from you since enquiry regarding the "La Favorita" brand or trade-mark, although during past month or six weeks we have had two communications from S. Oscar Ryder regarding same. We avoided answering the same. What do you know about New York and Penn. wheat crops, their prospect, and, then, how about Ohio; what do you hear from the millers in that State? Please give me what information you can. The prospects hereabouts not at all good. Indiana and Illinois very bad; Missouri about ½ of an average crop; Kansas is good. We look for pretty stiff prices from this time on, possibly too high for millers to use it to advantage. So far we have not had much warm weather, and what wheat we raise will have a late harvest. Let me hear from you. My regards to Mr. Holt.

Yours truly, J. H. GODDARD.

COMPLAINANTS' EXHIBIT. July 9, 1883. J. A. S., Ex.

(Copy.)

NEW YORK, *June* 5, 1883.

J. H. Goddard, St. Louis.

MY DEAR FRIEND: I was pleased to find your familiar handwriting on my desk; do not like to have old friends slip away
106 from us, and while we know that each year the use of N. Y. to St. Louis millers is rapidly becoming a place to send very

surplus stock only we are glad at all times to hear and return any information of interest and to be of service apart from the regular business. First, I am obliged for your declining to give any information to Mr. Ryder in regard to the brand you have. The facts are these: Mr. Holt personally originated a brand, "La Favorita," for which we have during the past twenty years built up, by care and painstaking work, a trade-mark that is valuable. This encouraged others, we are sorry to say, Mr. Ryder among them, to make imitations and offer as the original. This we are endeavoring to stop by the laws' slow process, and a claim was set up that a brand existed in St. Louis prior to ours. Of this we were ignorant, but such a case as that of which your father spoke, of the possession of a brand many years ago, but of subsequent disuse, would not work against us very badly. Still we are obliged by your kindness, as we shall be much pained to hear Mr. Goddard placed in opposition to us by any acts of our opponents.

The brand about which I wrote you a year ago was made at La Porte, Ind., but of later date than our own, has been coming to the Eastern markets for some years, but not interfering with our trade in any way. I would like your Mr. Goddard to know our position fully, as we think we are asking the courts to award us only that which is our own property, earned by years of care.

In regard to crops, we find that St. Louis is about as high relatively as any market in the country; more so than either N. Y. or Chicago. Our position is that, while N. Y., Md., Va., Del., and N. J. have about a full average crop, Penna. is poor, probably not over 75 per cent.; Ohio is very bad, our reports agreeing that 50 and 60 per cent. of last crop is all that can be expected. Our reports from Illinois are nearly as poor as Ohio, but Indiana is said to be
107 much better. Kansas is reported excellent, and Texas, Kentucky, and Tenn. good. If the spring wheat States have larger average and good results with the heavy stock we are carrying over from 1882 we think the deficiency may be less than claimed. Our export trade in wheat is very dead; orders are cancelled daily, and very full stocks said to exist in every part of Europe. Mr. Holt wished me to remember him kindly, and I add that it has given me pleasure to write you and hope that the next interval may be much shorter.

Very truly, L. J. BUSBY.

108 United States Circuit Court, Southern District of New York.

ROBERT S. HOLT *et al. vs.* JOSE MENENDEZ *et al.*

Testimony taken on the part of the respondents before John A. Shields, Esq., a standing examiner of said court.

NEW YORK, *April 4th*, 1883—3 p. m.

Present: S. S. McCutchen and Rolan Cox, of counsel for complainant, and John Henry Hull, of counsel for respondent.

Examination of S. Oscar Ryder.

1 Q. What is your name, age, and residence?

A. S. Oscar Ryder; forty-six; New York city.

2 Q. Were you one of the members of the firm of Holt & Co., and during what period?

A. First of February, sixty-one, to first of February, sixty-nine.

3 Q. When you went into the firm what trade-mark or brands of flour were owned by the firm?

A. Do not remember.

4 Q. Was any conveyance made by the old firm to the new firm of any trade-marks or brands that you recollect of?

A. None that I know of.

5 Q. When was the trade-mark or brand "La Favorita" originated?

A. I do not know.

109 6 Q. When did your firm first use it?

A. I don't know; I do not know.

7 Q. Did Mr. Holt originate it?

A. I don't know that.

8 Q. Was it ever used as a brand before you went into the firm?

A. I think not.

9 Q. Was it ever used by others, to your knowledge?

A. I did not know that it had been at that time, only from what I heard since.

10 Q. Do you now know that it was used during your membership of the firm by others?

A. Only from hearsay; I'm not positive.

11 Q. Give us what knowledge you have on this point.

Objected to by complainants' counsel on the ground that witness has stated that his information is derived simply from hearsay; question is immaterial.

A. Members of the firm of Robinson & Co. informed me that they had been receiving their brand of flour from Indiana for twenty years or more.

Complainants' counsel moves to strike out the answer as hearsay.

12 Q. At the time of your ceasing to be a member of the firm did you ever sell or convey any right to the trade-mark "La Favorita" to the firm of Holt & Co.?

A. I did not.

13 Q. Have you used it since your dissolution with Holt & Co., and for how long a time?

A. Fourteen years; I've been using it since.

14 Q. Has any objections been made to your using it by Holt & Co.?

A. Never, until last year.

15 Q. And that was just before the commencement of the suit?

A. Yes.

16 Q. Did you ever have any conversation with Mr. Holt regarding the trade-mark "La Selecta?"

A. Never.

17 Q. Did you ever have any conversation or make any statement before the committee or board of managers of the produce exchange regarding this brand of "La Selecta?"

110 A. I brought them a bill of sale from the executors of the originators of the brand "La Selecta."

18 Q. Did you ever promise Mr. Holt or anybody else that you would not use "La Selecta," "La Favorita," or other bands that had been used by the old firm?

A. Before leaving the firm I told Mr. Holt that I would not use the brand "Potomac," but the other brands not; I did not promise him that I would not use them; he did not ask it; I did it voluntarily.

19 Q. Do you recollect any shipment of "La Selecta" having been made by you at any unusual hour for business during the day?

A. I do not remember.

20 Q. Would the circumstance of shipping flour after six o'clock in the afternoon be an unusual occurrence?

A. It would be, but we have shipped as late as ten o'clock.

21 Q. And why were shipments made at these hours?

A. Because the flour could not be packed before.

22 Q. Does the brand "La Favorita" distinguish any particular make of flour?

A. It does not.

23 Q. Is flour from one mill or *for* one manufacturer selected for this brand?

Objected to by complainants' counsel as being immaterial and not appearing that the flour testified to by the witness to be the flour manufactured and sold by the complainants under this trade-mark.

24 Q. Was this the fact, that no one mill or one manufacturer's flour was used for the "La Favorita" brand during your connection with the firm of Holt & Co.?

A. Yes.

25 Q. Please state in what way the flour packed under the name "La Favorita" was selected during your connection with the firm of Holt & Co.

111 A. We took flour from any State that we thought was up in quality to what "La Favorita" should be.

26 Q. Did you keep any samples of the previous packing of "La Favorita" on hand?

A. Never.

27 Q. Then the selection of each packing of "La Favorita" was simply a question of memory and judgment as to what the standard of the brand was?

A. Solely.

28 Q. And in no instance was it ever a matter of comparison by sample of former lots?

A. Not to my knowledge.

Adjourned to Monday, April 9th, at 2 p. m.

NEW YORK, *April 9th*, 1883—2 o'clock p. m.

Met pursuant to adjournment.
Present: Counsel for respective parties.
Adjournment to Tuesday, April 10th, 1883, at 2 p. m.

NEW YORK, *April 10th*, 1883—2 o'clock p. m.

Adjourned to Wednesday, April 11th, 1883, at 2 o'clock p. m.

NEW YORK, *April 11th*, 1883—2 o'clock p. m.

Adjourned to Tuesday, April 17th, 1883, at 2 p. m.

NEW YORK, *April* 17, 1883—2 o'clock p. m.

Adjourned to Friday, April 20, 1883, at 2 p. m.

112 NEW YORK, *April* 20, 1883.

Met pursuant to adjournment.
Present: Counsel for respective parties.

S. OSCAR RYDER, a witness for defendants, testified as follows:

1 Q. What occurred between yourself and Mr. Holt in regard to the trade-mark "Potomac?"

A. When it was understood that Mr. Holt and myself should continue the firm of Holt & Company, he asked me to get out a trade-mark for the brand "Potomac" in my name. I told him I could not do so, as the brand belonged to the whole firm.

2 Q. Did Mr. Holt ever negative the taking out of the trade-mark?

Objected to as leading.

A. After the above conversation he coincided with me.

3 Q. Did the trial balances and appraisements of assets ever show the trade-marks as an asset?

Same objection.

A. Never.

9 Q. Did you ever promise not to use the trade-marks of Holt & Company?

Same objection.

A. I volunteered not to use the brand "Potomac."

5 Q. Did Holt & Company ever give you the trade-mark "Victoria?"

A. I do not remember such a brand.

6 Q. Did Mr. Holt ever protest against your taking impressions of the firm's different trade-marks?

Objected to as leading.

A. Never that I can remember.

7 Q. Did you ever conceal the fact of shipping "La Selecta" or state to any carman you wished it not to be seen?

Same objection.

A. Not that I remember.

113 8 Q. Did you ever assent to the view that the brands remained with the continuing firm?

Same objection.

A. Never.

9 Q. Did you ever say to Mr. Busby, "I have had to give in; I have had a good talking to, and have promised not to use any of the brands of Holt & Company," or anything to that effect?

Same objection.

A. I did not.

10 Q. Did you ever, before any committee, repeat any statement that you had promised not to use any of the brands of Holt & Company?

Same objection.

A. I did not.

11 Q. Is there any difference between the methods of making "La Favorita" flour and other flours that you know of?

Objected to as before and as immaterial, the objection to stand to all similar questions.

A. No; "La Favorita" is flour made from almost any State in the Union.

12 Q. Did Mr. Busby ever notify you personally not to use the brand "La Favorita?"

A. Never.

13 Q. Did you ever express regret that you had used the brand "La Favorita," or that the friendly relations between yourself and Mr. Holt had ever been severed?

A. The brand "La Favorita" has never been brought up until the present case.

Complainants' counsel objects on the ground that the answer is not responsive.

14 Q. Do you recollect any conversation with Mr. Busby on the floor of the exchange, on the occasion of his paying you any check, and wherein, as he states, your answer to him was that Holt & Company had attempted to persecute you, and that you felt yourself justified in retaliating?

A. I do not remember any such conversation.

114 15 Q. Did you ever intend, when you left the firm of Holt & Co., to surrender any right you had to any of the trademarks of the firm?

Objected to as incompetent.

A. "Potomac" only.

16 Q. And why that one only?

A. Because that was a valuable brand, and as Mr. Holt up to that time had been the best friend that I've ever had, I volunteered not to use it.

17 Q. Did you ever receive any notice through any book-keeper of Holt & Co. of their objections to your use of the brand "La Favorita?"

A. Never.

18 Q. Do you put up flour under the brand "La Favorita" accompanied always with your own name?

A. Not always.

19 Q. In what way is the brand used by you?

A. The last several years with my name on it.

20 Q. In any other way for the last several years?

A. Not that I can remember, but I would—do you want me to explain what that means?

21 Q. Yes.

A. If a customer wished to have the name of their house in the West Indies put on I would put it.

22 Q. Is that a custom in the trade?

A. It is.

23 Q. Did Holt & Co. ever do it while you were with them?

A. The brand was so little used at that time I could not remember; the brand at that time had "Georgetown" on it and not "Holt & Co."

24 Q. What did Georgetown mean?

A. It intended to mean that the flour came from Georgetown, D. C.

25 Q. And it was not true that it did come from there?

A. Very seldom.

26 Q. Up to what date was Georgetown used on the brand?

A. I think it was on when I left the firm.

Adjourned to April 27th, 1883, at 1.30.

115 NEW YORK, *May* 4, 1883—1.30.

Met pursuant to adjournment.

Present: Roland Cox and S. S. McCutcheon, of counsel for complainant; John Henry Hull.

Adjourned to Monday, May 7, 1883, at 1.30.

NEW YORK, *May 7th*, 1883—1.30 p. m.

Met pursuant to adjournment.

Present: Counsel as before.

Cross-examination of Mr. S. OSCAR RYDER by Mr. COX:

27 Q. What is your occupation?

A. Flour merchant.

28 Q. Are you in business for yourself?

A. I am not.

29 Q. In whose employ are you?

A. Nobody.

30 Q. Please explain your last answer; you say you are not in business for yourself.

A. I am running the flour business in my brother's name.

31 Q. Please let me understand what you mean by running the flour business in your brother's name.

A. I got wound up in stock operations; lost my money; done an elegant business, and then ran it in his name.

32 Q. By your last answer you mean that you became involved in stock operations and then made your business over to your brother, do you not?

A. I do not mean that.

33 Q. Have the kindness to say what you do mean.

116 A. Well, I mean to say that I run the business in his name and could take it back again at any moment.

34 Q. Are you a partner in this business that is run in your brother's name?

A. I am not.

35 Q. Is it not true that all your interest in the business was assigned to him at the time you became involved by reason of your stock operations, of which you have spoken?

A. The way I understand it, not one cent of it.

36 Q. I have some difficulty in understanding you. Will you have the kindness to let us understand just what your relations are to the business that you say is run in your brother's name?

A. The business is run in his name and the profits are taken by my wife and him, with the understanding that I can take it (the business) all at any time I choose.

37 Q. At the time you became involved the business in which you were engaged was placed beyond the reach of your creditors, was it not?

A. No.

38 Q. What was the object of running it in your brother's name?

Counsel for defendants directs the witness not to answer the question on the ground that it is irrelevant.

Complainants' counsel gives notice that he claims the right to apply to the court and compel an answer without waiving their right to continue the examination.

The witness here said, "Do I answer that?" to which his counsel replied, "No, I direct you not to."

39 Q. Then I understand you are not willing to state or explain how it happened that you are carrying on business in the name of your brother instead of your own name?

Counsel for defendants directs witness not to answer this question on the ground that it is irrelevant; same notice and reservation by complainants' counsel.

117 Complainants' counsel now asks you whether you have any answers to the question.

Defendants' counsel directs witness not to answer this question on the same grounds, and that it is but a repetition of the former question.

Examiner was thereupon requested to put the question to the witness.

(Q. read to witness.) Question having been read to the witness he remained silent, making no answer whatever.

40 Q. Do you know anything about the answer in this case?

A. I would like to have that explained.

41 Q. The answer was executed by the defendants as a reply to the bill of complaint; please answer with this explanation.

A. I read it over once, but do not remember much about it.

42 Q. Didn't you supply the statements of facts from which it was made up?

A. I did not.

43 Q. Do you know who did?

A. I do not.

44 Q. You say you read the answer over; what object had you in reading it?

A. I was out of town at the time the whole thing was done, and, as far as I remember, I was requested to do so by Mr. Hull.

45 Q. Did you read it before it was sworn to or after that?

A. I do not remember.

46 Q. Didn't you read it for the purpose of informing Mr. Hull whether the statements it contained were true?

A. I do not remember that.

47 Q. Can't you tell us why he applied to you to read it?

A. I am not positive that he asked me to do so.

48 Q. It is possible, then, that you did not furnish the information on which the answer was prepared?

A. I have no recollection that I did.

49 Q. Do you wish us to understand that you do not know whether you did or did not furnish the information from which the answer was prepared?

A. I do not remember whether I did or not.

118 50 Q. I direct your attention to the following extract from the answer. Before putting this question, as your deposition has been taken by your counsel as that of S. Oscar Ryder, I will ask you whether you are the Stephen O. Ryder mentioned in the answer?

A. I should think I was the same man.

51 Q. Your name is Stephen O. Ryder?

A. Yes, sir.

52 Q. I now direct your attention to the following allegation in — answer: "Defendant, further answering, alleges that * * * Stephen O. Ryder * * * has always and does now own and use the same" (meaning the words "La Favorita") "as a proprietor and owner thereof, and has continually used the same as his individual trade-mark, and has always been entitled to use the same." Is that statement true?

A. Yes.

53 Q. Then you claim to be the proprietor and owner of the brand "La Favorita?"

A. Not the sole owner.

54 Q. Do you claim that it's one of your trade-marks?

A. I do.

55 Q. Do you claim that it serves to distinguish flour made for you or of your selection from the flour of other people?

A. I do.

56 Q. On what do you base the statement just made—the statement that the words "La Favorita" serve to distinguish the flour of your selection from that of other people?

A. Because it has my name on it.

57 Q. How long has it had your name on it?

A. I think about ten years.

58 Q. Can you be positive about the time?

A. I cannot.

59 Q. Why do you fix ten years as the time?

A. Because for some years I have put on "Georgetown."

60 Q. During the time you used the word "Georgetown" was the brand "La Favorita" known to denote your goods?

A. They did not, solely.

119 61 Q. Whose goods did the words "La Favorita" indicate besides yours?

A. No one in particular.

62 Q. Please explain your last answer. Whose goods did they indicate?

A. I suppose that Rob't S. Holt and myself were the sole owners of the brand.

63 Q. You mean the brand "La Favorita?"

A. The brand "La Favorita;" and as other parties were using the brand and as I consider the brand of small value I made no objection.

64 Q. You mean you made no objection during the time you used the word "Georgetown?"

A. I have never made any objections to the brand being used except with my name on it.

65 Q. During what time do you claim that Rob't S. Holt and yourself were the "sole owners?"

A. I missed one name—the name of Searles—ever since the brand was originated.

66 Q. Do you think Rob't S. Holt, yourself, and the representatives of Mr. Searles are now the sole owners of the brand?

A. I do not.

67 Q. Do you think Mr. Holt and yourself now own it?

A. I do, if there's no law against it.

68 Q. How did it happen that you used the word "Georgetown" and did not use your own name as part of your brand for some years?

A. Because I made up my mind that I would put my own name upon almost all my brands so as to advertise my name and so that the trade would ask for brands of flour made by S. Oscar Ryder.

69 Q. You don't mean you made the flour, do you; you mean selected by you, do you not?

A. I mean so.

70 Q. Do you think the act of selection made by you would be enough to give the flour character in the market?

A. I do.

71 Q. Why?

A. I had a splendid trade here among the shippers, and by their sending my brands out with my name on them it would advertise all my flours.

120 72 Q. How was it during the time your name was not used—when the word Georgetown was used?

A. I never thought of it at that time.

73 Q. Do you think it requires any skill to select flour?

A. I do.

74 Q. Do you think it requires as much as it does to make it?

A. I do.

75 Q. Do you think it requires more skill to select it than make it?

A. I do.

76 Q. Now, returning to this period when you used the word "Georgetown," can't you give us a fuller explanation of the reason why you did not use your own name?

A. Because Georgetown flour was well known in all the Southern markets.

77 Q. Why, then, did you not continue to use the word "Georgetown" after you added your own name?

A. Because Georgetown flours died out in the market.

78 Q. How long did you use the word "Georgetown" after you commenced to use the words "La Favorita?"

A. I do not know.

79 Q. Can't you give us some idea?

A. I have no means of finding out.

80 Q. You have said, I think, that it was several years?

A. I think I did.

81 Q. Was the word Georgetown used in connection with the words "La Favorita" by Holt & Co.?

A. I think it was for years.

82 Q. Why do you say it was; have you recollection of having seen the word Georgetown used while you were with Holt & Co.?

A. I think I am most positive I did.

83 Q. You have some doubts about it, however?

A. I have doubts of anything that happened so long ago.

84 Q. Why do you say that you think you are most positive?

A. Because, if I remember rightly, we branded almost all our flours Georgetown.

85 Q. Then to the best of your recollection the word Geo rge-
121 town was used by Holt & Co. in place of their name in connection with the words "La Favorita?"

A. Yes.

86 Q. That is your memory on the subject?

A. It is.

87 Q. Will you please reflect and say whether you cannot re-

member some shipment of "La Favorita" flour by Holt & Co. when they used the word "Georgetown?"

A. I cannot; flour at that time was very little used.

88 Q. Then it may be true that the word Georgetown has never at any time been used by the firm of Holt & Co. in connection with the words "La Favorita?"

A. It may.

89 Q. And your statement in your examination-in-chief that "the brand at that time had 'Georgetown'" on it, not "Holt & Co.," may be a mistake?

A. It may be.

90 Q. Is it not true that you have no distinct recollection of what words were used by Holt & Co. in connection with the words "La Favorita?"

A. I have no distinct recollection.

91 Q. All you remember is that they used the words "La Favorita?"

A. Positively; yes.

92 Q. I direct your attention to the following allegation in the answer: "Defendant alleges that in the year 1861, up to the year 1868, Stephen O. Ryder was a member of the complainants' firm of Holt & Co. and was one of the originators of the said trade-mark 'La Favorita;'" are these statements true?

A. The statement that I was one of the firm is true; the other statement, I think, was taken from the papers sworn to by Holt & Co. when taking out the trade-mark.

Last part of the answer objected to as being incompetent.

93 Q. Is it true or not?

A. I am not positive as regards the brand, as I have not looked over their books; they were my books.

94 Q. What is your judgment about it; were you one of the originators of the brand?

A. I was then—it was originated in 1861.

122 95 Q. Please let me understand your last answer.

A. Because I was one of the firm at that time.

96 Q. Then you were one of the originators of the brand, you think?

A. I begin to think that I was not.

97 Q. Please answer the question directly. Were you or not one of the originators of the brand "La Favorita?"

A. By what I have learned lately I would not be willing to swear to it.

98 Q. You mean to say that the brand "La Favorita" was originated while you were in the firm?

A. I thought so a few months ago, but I am not positive now.

99 Q. What caused you to change your belief?

A. Parties have led me to believe that it was used years before that.

100 Q. Was it used by the firm of Holt & Co. before you became a partner.

A. I should think not from their sworn statements.

101 Q. Do you know of your own knowledge?

A. I do not.

102 Q. You have no recollection, then, of the time when it was first used by Holt & Co?

A. I have not.

103 Q. Your mind is at blank on that subject, is it not?

A. It is.

104 —. You speak of the brand "Potomac" having been used by the firm of Holt & Co.; it was a brand of some value, was it not?

A. It was.

105 Q. Was it as valuable as the brand "La Favorita?"

A. I considered it a great deal more valuable.

106 Q. Was it used to a very considerable extent by the firm of Holt & Co.?

A. It was.

107 Q. When was it originated, if you know?

A. I should think about 50 to 75 years ago.

108 Q. It was in use then by Holt & Co., when you went into their employ?

A. It was.

109 Q. And that was in what year?

A. 1854 or 1855.

123 110 Q. What other brands were used by Holt & Co. during the time you were with them, either as partner or clerk?

A. I can only remember La Favorita, Montrose Family, Aurora; I can't think of any others except they were owned by outside parties.

111 Q. Then your recollection is that in 1868 Holt & Co. had but three brands in use?

A. As belonging to themselves; I cannot.

112 Q. You have no recollection of their using, prior to 1868, during the time you were a partner, any brands other than the three you have mentioned?

A. One other—La Selecta.

113 Q. That brand, La Selecta, you had forgotten at the time you answered the preceding questions?

A. I had not.

114 Q. Why, then, did you not mention it?

A. Because it belonged to the estate of one of our deceased merchants or customers.

115 Q. What do you mean when you say that Holt & Co. used it; did they not claim it as one of their brands?

A. I think they did, because the man was dead.

116 Q. Do you remember any others besides these four you have named—Potomac, La Favorita, Montrose Family, and La Selecta—that were used by Holt & Co. as their brands prior to the year 1868, while you were a member of the firm or before?

A. I cannot remember, but I think I could inform a little more at the next meeting from my books.

117 Q. At the present time, without consulting your books, you have no recollection of any others being used?

A. I have no recollection of any others.

118 Q. You say this after reflection?

A. I do.

119 Q. What was the most valuable of these brands?

A. Potomac.

120 Q. You are clear about that?

A. Very clear.

121 Q. What was it worth as a brand?

A. I should suppose thousands of dollars.

122 Q. Isn't that a high estimate?

A. I think not.

124 123 Q. What do you mean by thousands of dollars?

A. Well, I should think five to eight thousand dollars.

124 Q. Think it would have sold for that or anything like it?

A. I think it would if a clear title could be given to it.

125 Q. How about the other three brands you have mentioned as used by Holt & Co.; were they worth anything?

A. As far as I can recollect, nearly nothing.

126 Q. You think they had very little value at all?

A. Very little.

127 Q. Please give me your best judgment as to what they were worth—the three.

A. As far as I can best remember I don't think they were worth $250 together.

128 Q. Then at the time you left Holt & Co. you are willing to say that, in your judgment, these four brands were worth not more than ten thousand dollars at the outside?

A. I would rather give my answer as it is above, dividing them.

129 Q. Is it not true that before you ceased to be a partner in the firm of Holt & Co. you caused impressions to be taken of a number of their brands?

A. All brands in the store, whether claimed by them or other parties, and also all the names of their customers.

130 Q. You took impressions of all their brands, I understand, and a list of all their customers?

A. Customers' brands, too, and the customers' names.

131 Q. All the brands, you say, do you not, including Potomac?

A. Including Potomac.

132 Q. Did the name of Holt & Co. constitute part of these brands?

A. I cannot remember that one of them had "Holt & Co." on.

133 Q. Not one?

A. I don't think one.

134 Q. Are you quite clear about that?

A. I am not clear, by any means.

135 Q. You can't be positive?

A. I cannot.

125 136 Q. How many of them may have contained the name of Holt & Co?

A. I really don't think one of them.

137 Q. Your recollection is that no one of them contained the name of Holt & Co.?

A. That is my recollection.

138 Q. Did you send circulars—a list of Holt & Co.'s customers—immediately after you left the firm?

A. Holt & Co.'s customers and my customers were the same; I don't remember sending out any circulars.

139 Q. Did you apply to any of them for orders or business in any way?

A. I think all of them.

140 Q. Immediately after you left the firm of Holt & Co.?

A. As far as I remember, yes.

141 Q. You competed with Holt & Co. for their trade?

A. I did.

142 Q. And you were anxious to have the trade of all of them?

—. If I could get them.

143 Q. What efforts did you make in your competition with Holt & Co.?

A. I presented my card to them and told them I would like to have as much of their trade as they could give me, but I would not be able to give them the brand Potomac.

144 Q. What became of the brand Aurora, if you remember?

A. I used that with the others.

145 Q. With what others?

A. I can only remember the Montrose Family that we were using at that time.

146 Q. Who do you mean by "we?"

A. Mr. Roland.

147 Q. And the brand Aurora had been used by Holt & Co.?

A. It had.

148 Q. For how long a time?

A. I haven't the least idea.

149 Q. One of their brands, however, was it not?

A. It was.

150 Q. And was used while you were partner?

A. It was.

151 Q. Now, will you please tell me why you did not include it in your list of Holt & Company's brands when I asked you to name them?

126

A. I did and spelt it out.

152 Q. Did you not tell me that you were only able to mention four brands?

A. I think you will find five there. I spelt Aurora out.

153 Q. Do you mean to say that you have not repeatedly stated this afternoon, when I asked you for a list of Holt & Co.'s brands, that you could mention but four?

A. I have; I think so.

154. Q. You have testified that you could remember but four, have you not?

A. I think I have.

155 Q. And it is true, is it not, that at the time you stated that you remembered but four you had entirely forgotten the brand Aurora?

A. Don't think I forgot it, because I spelt it out.

The examiner is requested to read to witness X Q's 116, 117, and 118, which questions having been read to the witness, the examination is continued.

156 Q. When you answered these questions that have just been read to you, you had forgotten about the brand Aurora, had you not?

A. I supposed the brand Aurora, because I had been asked to-day what brands have been used by Holt & Co., as far as I could recollect, and I am almost positive the brand Aurora was in one of the questions, and thought it was in this; the brand La Selecta being added to the former list.

157 Q. You mean to say that when I asked you to name the brands of the firm you named Aurora as one of them?

A. I am almost positive.

158 Q. Will you now please state all the brands that you remember that were used by Holt & Co. while you were a member of the firm?

A. Potomac, La Favorita, Montrose Family, Aurora, La Selecta.

159 Q. Is that all?

A. That's all I remember.

Adjourned till Thursday, May 10th, 1883, at 1.30 p. m.

127 NEW YORK, *May* 10, 1883.

Present: Mr. Cox and Mr. McCutcheon, for the complainants; Mr. Hull, for the defendants.

No witness being on hand, the further hearing is adjourned to May 14, 1883, at 1.30 p. m.

NEW YORK, *May* 14, 1883.

Pursuant to adjournment parties met.

Present: Mr. Cox and Mr. McCutcheon, for the complainants; Mr. Hull, for the defendants.

No witness being on hand, the further hearing is adjourned to May 18, at 1.30 p. m.

NEW YORK, *May* 18, 1883.

Met pursuant to adjournment.

Present: Roland Cox, Esq., and S. S. McCutcheon, Esq., on the part of complainants, and John Henry Hull, on the part of defendants.

There being no witness present, after remaining in session for twenty minutes, counsel for defendant having notified counsel for complainant that the witness had sent word that he could not attend on account of sickness, the meeting was adjourned to 11 o'clock a. m., Wednesday, May 23, 1883.

MAY 23, 1883.

128 Parties met pursuant to adjournment.
Present: Counsel as before.
There being no witness present, further hearing is adjourned to May 28th, 1883, at 1 p. m.

NEW YORK, *May* 28, 1883.

Met pursuant to adjournment.
Present: Rowland Cox and S. S. McCutcheon, Esqs., for complainants; John Henry Hull, Esq., for respondents.

Cross-examination of S. OSCAR RYDER continued:

Q. We understand you to say that you do not remember whether you did or did not furnish the information upon which the answer in this case was prepared. You have so testified, have you not?
A. I have.
Q. You do not remember whether you furnished the information or not?
A. I do not remember.
Q. You do not remember whether the word "Georgetown" was ever used by Holt & Co. in connection with the words "La Favorita?"
A. I do not.
Q. You do not remember whether it was or not?
A. I am not positive.
Q. Why do you say that you are not positive?
A. Because I am not.
Q. You do not remember, then, whether the word "Georgetown" was or was not used in connection with the words "La Favorita?"
A. Not positively.
129 Q. When you say you are not positive do you mean that, to the best of your knowledge and belief, it was used?
A. That it was used.
Q. To the best of your knowledge, you believe that the word "Georgetown" was used in connection with the words "La Favorita?"
A. Yes.
Q. And upon what do you base your statement that it was?
A. Only a slight remembrance of years ago.
Q. You have, then, a slight remembrance that the word "Georgetown" was used in connection with the words "La Favorita?"
A. Yes.
Q. Did you continue to use the brand after you left the firm just as it had been used while you were connected with the firm?
A. I do not think I did.
Q. What change, then, did you make in the brand?
A. I made a circle that way instead of this way (illustrating).
Q. Did you add any words to the brand?
A. I do not think I did.

Q. You think you did not change the wording of the brand as it had been used by the firm of Holt & Co. before you left it?

A. I think not.

Q. Can you not be positive about it?

A. No.

Q. Why not?

A. Because I do not remember.

Q. You do not remember, then, whether you changed the brand or not?

A. No.

Q. You may have changed it?

A. I may have changed the wording of it.

Q. Was the brand round in its original form, as used by Holt & Co.?

A. No; just the words "La Favorita" were used. They did not care how it was worded.

Q. The distinguishing feature was the words "La Favorita?"

A. Yes; "La Favorita."

Q. You have testified, have you not, that you do not remember whether any of the brands of Holt & Co., copies of which you took, contain the name of Holt & Co.?

A. I do not.

Q. You do not remember whether they do or not?

130 A. No; I think those copies were all destroyed when we had the fire.

Q. Will you have the kindness to mention again all the brands which you remember which were used by Holt & Co. while you were a member of that firm?

A. "Aurora," "Montrose Family," "Potomac," "La Selecta," and "La Favorita."

Q. That is five in all?

A. Five in all; that is all I remember. I just happened to think of another—"Whealand."

Q. Then there were six?

A. Yes.

Q. Do you remember the brand "Alida" as one used by the firm of Holt & Co. while you were still a member of that firm?

A. I do not.

Q. Will you say that it was not used?

A. All I know is that we called it "Alida;" there was such a brand.

Q. That brand you had forgotten entirely, had you not?

A. I did not remember it.

Q. Do you remember the brand "Golden City?"

A. Used by us? No.

Q. Will you say that such a brand was not used by the firm of Holt & Co. while you were a member of that firm?

A. Of course I will not say that.

Q. All you will say is that you do not remember it?

A. I do not remember it,

Q. Do you remember the brand "Swan" as used by Holt & Co.?

A. I do not.

Q. You will not say that it was not used by them while you were a member of the firm?

A. I will not.

Q. Do you remember the brand "Scio?"

A. I have an indistinct recollection of such a brand.

Q. Do you not know that it was used by Holt & Co. while you were a member of that firm?

A. I do not.

Q. Then why do you say that you have an indistinct recollection of it?

A. I think I remember such a brand, but I do not remember that it was used by them.

Q. Do you remember the brand "Belle Mount?"

131 A. I recollect such a brand, but not as used by them. I cannot remember that.

Q. Do you remember by whom it was used?

A. I do not.

Q. It is possible that the brand "Belle Mount" may have been used by the firm of Holt & Co., is it not?

A. Yes.

Q. Do you remember the brand "Extra Baker's" as having been used by them?

A. Yes.

Q. As having been used by Holt & Co. while you were a member of that firm?

A. I think it was.

Q. And that brand you had also forgotten when you enumerated those which you remembered?

A. Yes.

Q. Do you remember the brand "City Mills?"

A. Not as used by them. I recollect the brand.

Q. You recollect the brand, but not as a brand that was used by the firm of Holt & Co. while you were a member of that firm?

A. Yes.

Q. It may, however, have been used by them?

A. Yes.

Q. Why did you say that the brand "Potomac" was worth thousands of dollars; what made it valuable?

A. Because all our principal shippers used it.

Q. What do you mean when you say that your principal shippers used it?

A. The houses that shipped our flour to Central America.

Q. And their trade depended upon the use of this brand?

A. Yes; the order came for that brand?

Q. The trade depended absolutely upon the use of the brand "Potomac," did it?

A. What trade?

Q. The trade of these shippers to whom you have just referred as the shippers whose orders called for "Potomac" flour.

A. The orders came for "Potomac," and they did not take anything else.

Q. And unless the "Potomac" flour could be supplied that trade would seek other houses?

A. There was nothing in the world that could stop them making calls for "Potomac," not getting it from Holt & Co.

132 Q. What do you mean by that?

A. They put "Potomac" on the flour that they bought all over every part of the United States.

Q. But this demand for "Potomac" could not be supplied unless the brand was used; that is right, is it not?

A. They could use other brands with other names.

Q. Do you mean to say that the people who desired "Potomac" flour would take other flour than "Potomac?"

A. They would; certainly.

Q. Was there not a fixed demand for "Potomac" flour?

A. There was.

Q. And that could only be supplied by the brand "Potomac?"

A. Unless the commission houses here saw fit and changed it to please themselves.

Q. What do you mean by changing it to please themselves?

A. I mean this: That when I left Holt & Co. all these principal shippers wrote "Potomac" off their books and took my brand.

Q. These principal shippers wrote "Potomac" off their books and took your brand?

A. Yes.

Q. What brand?

A. Not my brand, but the brands I made for them.

Q. What brands were they?

A. "La Union," "El Aquila," "Southern Bell," "La Perla." Those are the only ones I remember.

Q. What became of Holt & Co.'s trade in "Potomac?"

A. It ran down very much.

Q. On account of the demand for "Potomac" being superseded by these new brands which you were introducing?

A. Which I was introducing.

Q. These brands were originated when you left Holt & Co., as I understand you?

A. For these companies, not as my own brands; they could have taken them away from me any day they pleased.

Q. Do you think that the trade in "Potomac" was materially affected when you left the firm of Holt & Co. and offered these new brands?

A. Six weeks afterwards it was very much diminished.

133 Q. Why?

A. Because these shippers liked me and took these brands that I speak of.

Q. The brand of "La Union" is a brand to which you attach great importance, is it not?

A. Yes.

Q. What proportion of your trade probably depends upon the use of those words "La Union" as a brand?

A. I should think one-quarter of it.

Q. And what proportion depends on "La Perla?" Give me a general idea.

A. On "La Perla" and the others very small.

Q. Then, if you were prevented from using the words "La Union" it would very seriously affect your trade?

A. Very much.

Q. And for the same reason, as I understand you, it is your judgment that if Holt & Co. had not been able to use the brand "Potomac" their trade would have been very materially affected?

A. It was.

Q. And if they could not have used the brand "Potomac" it would have been still more seriously affected?

A. It would; certainly.

Q. If you had used the brand "Potomac" you could have gone into the market and superseded their trade entirely in that brand?

A. Not with every party, but with these principal customers.

Q. You could have done so with a large number of their customers?

A. I could; certainly.

Q. From the fact that they would buy the goods on account of the name?

A. No; on account of me.

Q. If you had used the brand "Potomac" your sales would have been affected much more readily than when you used the new brands, would they not?

A. Very much more; yes, sir.

Q. In regard to the brand "La Favorita," I think you have said that it was a brand which probably had no value at the time you severed your connection with Holt & Co.?

A. Very little indeed.

Q. On what do you base your statement that it was of very little value?

134 A. Because I cannot remember of anybody that was using it to any extent at all, because "Potomac" was the brand they wanted.

Q. Can you give me any idea of the extent to which "La Favorita" had been used before you left the firm?

A. Very little indeed, I think.

Q. About how many barrels or packages had it been used upon?

A. I cannot think of them; I cannot remember at all.

Q. Can you not give me a general idea?

A. I cannot, because our business for these shippers was in "Potomac."

Q. Do you suppose that it was used on 500 packages?

A. Yes.

Q. Do you suppose that it was used on 500 packages during the time you were a member of the firm of Holt & Co?

A. Yes, certainly.

Q. Had it been used on 1,000 packages, do you think?
A. I should think so.
Q. On 2,000?
A. I should think so.
Q. On 5,000?
A. I should think so.
Q. On 10,000?
A. I do not think it was.
Q. If it had been used on 5,000 packages was not that a sufficient use to give it a value in the market?
A. No.
Q. When you entered the firm of Holt & Co. you have said, I believe, that no transfer of the brands or trade-marks or good will of the old firm was made to the new one; you have so stated, have you not?
A. I do not remember what I did say. Do you mean a regular transfer? No, there was none.
Q. You have said, I think, that you understood Mr. Holt to propose to you that you make a registration of the brand "Potomac," which you declined to proceed with, on the ground that it was the property of the firm?
A. Certainly.
Q. How do you explain the fact that the "Potomac" became the property of the firm when you say that no transfer of it was made by the old firm to the new?
A. No regular transfer; there never had been.
135 Q. Was there any transfer made?
A. Except that we took everything that they had there.
Q. How did you take everything that they had; by virtue of what?
A. Because the partner that had left made no objections and did not go into that business again.
Q. Because the partner that had left made no objections and did not go into that business again?
A. Yes.
Q. And for that reason, in your judgment, these brands became the property of the succeeding firm?
A. Yes.
Q. That was the understanding at the time?
A. There was no understanding at all.
Q. How, then, do you account for the fact that it was recognized that "Potomac," which was the leading brand of the old firm, became the property of the new?
A. Because it was always considered so.
Q. Why was it considered so; was it not because there was a custom in the firm by which the new firm took the good will, brands, and trade-marks of the old?
A. Nothing of the kind; the way of it was that nobody ever before left the firm that ever went into that shipping business, so of course there was no trouble.
Q. Do you mean to say that you did not regard "Potomac" as your property at the time that you were a member of the firm of Holt & Co.?

A. I considered that it was just as much mine as Mr. Searle's or Mr. Holt's.

Q. How did you understand that you got title to it?

A. Under the head of "charges account," I suppose.

Q. Was it enumerated in the charges account?

A. No, the brands never were.

Q. How were they enumerated?

A. Never enumerated at all.

Q. Why not?

A. I don't know why.

Q. What is your best judgment?

A. I have not the least idea about it.

136 Q. Can you not give me some explanation why they were not enumerated?

A. I cannot.

Q. Do you not think it was because they were not intended to be made the subject of division?

A. No.

Q. Everything else was divided, was it not?

A. No.

Q. What else was there that was not divided?

A. Horses and trucks and such things.

Q. They were appraised, were they not?

A. Yes.

Q. Then they were made the subject of division in that way?

A. Yes.

Q. Can you name anything else?

A. I cannot think of anything else—store fixtures.

Q. They were appraised, were they not?

A. Yes; but the brands, never.

Q. Is it not true that they were appraised at the time that the new firm, when you first became a partner, succeeded the old firm?

A. Never.

Q. They were not appraised at that time?

A. No.

Q. And you account for that fact simply because the retiring partner was not going into the flour and commission business?

A. He was not going into shipping business.

Q. That is the only reason you know of why they were not made the subject of appraisement?

A. Yes.

Q. It was understood that you were going into the flour business, of course, when you left the firm of Holt & Co.?

A. Yes.

Q. Why, then, were they not made specifically the subject of appraisement at that time?

A. Because I gave up all right, title, and interest to those valuable brands to Robert S. Holt out of friendship, so there was no occasion for it. He had been my best friend in the world, and I did it for that reason.

Q. You have said that the reason why the brands were not ap-

praised at the time you entered the firm was because the retiring partner was not going into the flour business; you have also
137 said that it was known at the time you left the firm that you were going into the flour business?

A. Yes.

Q. Was there not, then, a reason at the time you left the firm why there should be an appraisement?

A. By all means.

Q. Then how do you account for the fact that they were not made the subject of appraisement?

A. I suppose because I gave up these valuable brands, which I considered worth $8,000.

Q. You say that the reason why the brands other than "Potomac" were not made the subject of appraisement was because you promised not to use the brand "Potomac;" you have so stated, have you not?

A. I suppose that the reason was because I did not demand it on account of that valuable brand being given up.

Q. What was the reason? Please answer the question, which calls for the reason.

A. That is the only answer.

Q. Then the fact that you agreed to give up the valuable brand "Potomac" was not merely the reason why there was no appraisement?

A. I did not agree to give it up. I went and told Robert S. Holt that I would let him have it. I do not know whether you call that an agreement or not.

Q. You told him in substance that you would not use it?

A. There was no written agreement of any kind.

Q. The statement which you have made in your examination-in-chief is as follows: "Before leaving the firm I told Mr. Holt that I would not use the brand 'Potomac.'" How long before leaving the firm was this that you told Mr. Holt you would not use the brand "Potomac?"

A. I cannot remember.

Q. Is it not true that Mr. Holt sent for you and said to you that you had made copies of the brands; do you remember anything of that kind?

A. No; I do not.

Q. Do you remember Mr. Holt's sending for you just before
138 you left the firm and referring to your having taken impressions of the brands?

A. I do not.

Q. You will not say that he did not?

A. I will not.

Q. He may have done so?

A. He may have done so.

Q. When you say, as you do in your cross-examination, "I have doubts of anything that happened so long ago," what do you mean?

A. It was so long ago that I do not remember distinctly everything.

Q. Do you remember a circular being issued by Holt & Co. at the time you left the firm, in which your withdrawal was announced, and that, in connection with your withdrawal, announcement was made that you had formed a partnership with Mr. Rowland?

A. I don't remember it; it might have happened.

Q. Do you not remember that any such circular was issued?

A. I do not.

Q. Your mind is a blank upon that subject?

A. Yes.

Q. You have no recollection of it whatever?

A. It might have been done, though.

Q. You would not recognize any circular or a copy of any circular issued at that time, if any was issued?

A. Certainly, I would.

Q. You would recognize it?

A. Certainly.

Q. I now show you a paper, which is marked "J. A. S." for identification. Please examine it and say whether you recognize it as being a copy of a circular issued at the time you withdrew from the firm of Holt & Co.?

A. I do distinctly remember that.

Q. Do you remember it as being an accurate copy of a circular issued at the time you withdrew from the firm of Holt & Co.?

A. I suppose that it is accurate.

Q. You remember that a circular substantially similar to this was issued?

A. I think that it was—sure.

139 Q. You have no doubt that this is a substantially accurate copy of the circular issued at that time?

A. None whatever.

Said paper is offered in evidence by complainants' counsel and is marked "Exhibit X of May 29, 1883."

Q. I understand you to say that you thought nothing of the value of the brand "La Favorita" at the time you left the firm of Holt & Co.?

A. I thought it was of small value.

Q. Can you give us any idea what it was worth at that time?

A. I could not.

Q. If it had any value it was merely nominal?

A. I could not tell you that.

A. How, then, are you able to say positively that it and other brands used by Holt & Co. were not referred to at the time you had this conversation with Mr. Holt?

A. No such question has ever been asked me. It was when I left the firm—you asked me what they were worth when I left the firm.

Q. I will read to you from your examination-in-chief: Q. Did you ever promise Mr. Holt or anybody else that you would not use "La Selecta," "La Favorita," or other brands that had been used by the old firm? A. Before leaving the firm I told Mr. Holt that I would

not use the brand "Potomac," but the other brands not. Now, please answer the question with this explanation.

A. I do not think that is the time—you asked me that the other day—but it was when I left Holt & Co.

Q. You have stated, have you not, that before leaving Holt & Co. you told Mr. Holt that you would not use the brand "Potomac?"

A. I did.

Q. And you have also said that you do not remember when that promise was made?

A. He did not ask me not to use the brand "Potomac;" I went and told him that I would not use it.

Q. When was it that you went to tell him that you would not use it?

A. I cannot tell you that.

Q. That you cannot remember?

A. No.

140 Q. All you remember about it is that you went to tell him that you would not use the brand "Potomac?"

A. Out of friendship.

Q. What I wish to know is how you are able to say positively that at that time you did not refer to the brands "La Favorita," "La Selecta," and other brands?

A. Because that was such an important thing, the whole part of our business with the shippers, and anything of that kind I would remember very easily.

Q. Do you remember that you did not refer to "La Favorita?"

A. I cannot remember.

Q. You may have done so?

A. I might have done anything; I cannot remember, except that one thing.

Q. The time is so far distant that your memory on the subject is not clear?

A. It is not.

Q. You would not swear positively one way or the other?

A. The reason I can remember the part of the "Potomac" is that I have never used it in my life; but the other brands, I have used them all, every one of them, ever since I left the firm.

Q. All of the brands of Holt & Co.?

A. That I ever had orders for, excepting "Potomac;" that was the principal part of our business; I have never touched it.

Q. Is that the only ground you have for your statement concerning "La Favorita," that you have used it continuously since you left the firm?

A. Yes; that I considered it belonging me, as I never gave it up.

Q. Which was the first of the brands of Holt & Co. that you remember to have used after leaving the firm?

A. I do not remember.

Q. What was your defense before the complaint committee of the produce exchange, when Holt & Co. preferred their complaint against you for using the brand "La Selecta?"

A. I do not remember that even.

141 Q. You do not remember what your defense was before the complaint committee?

A. I think it was that the brand did not belong to Holt & Co.

Q. And that it belonged to an estate from which you purchased it?

A. Yes.

Q. And that was the only defense, was it not?

A. Yes.

Q. The brand "La Favorita" you began to use in the latter part of the year 1869, did you not; or do you not remember that?

A. The latter part of 1869? It was the first part. When was the firm dissolved? It was the first part of 1869.

Q. Do you remember the first shipment that you made?

A. I do not.

Q. Can you give me any shipment which you made during the year 1869?

A. I do not remember any.

Q. To what extent did you use it during that year?

A. Very largely.

Q. Very largely?

A. I think so.

Q. But you cannot give me the name of a single person to whom you made the shipments?

A. Not thirteen years ago; certainly not.

Q. What do you mean by very largely; did you sell thousands of packages?

A. I think two or three thousand, probably.

Q. Can you be positive about that?

A. I would not be.

Q. You would not say positively that you made one shipment during the year 1869?

A. I know that I used it whenever it was called for.

Q. And that is all you remember about it?

A. Yes.

Q. Can you state from memory what the words were on the brand as you used it at first?

A. It had "La Favorita" across the top, and a star in the middle, and "Family Flour;" I cannot remember whether it had "Georgetown" or "S. Oscar Ryder."

Q. It had "S. Oscar Ryder" or "Georgetown," but you do not remember which?

A. It could not be "S. Oscar Ryder," for it would be "Rowland & Ryder;" I think it was "Georgetown."

142 Q. Can you be positive about that?

A. No.

Q. Was the name "Rowland & Ryder" ever used in connection with the words "La Favorita?"

A. I do not think it was.

Q. How do you explain the fact that you originated these new brands which you have mentioned immediately after leaving the firm of Holt & Co.?

A. Because the principal business was "Potomac," which I had

given up, and these shippers were all using "Potomac," and they had "Potomac" on the books; orders, orders, orders, from all parts of the country and from Central America; and because they liked me they wiped them all out and I made them private brands.

Q. Do you mean to say that the brand is of as much importance in the business as that?

A. It was.

Q. What proportion of Holt & Co.'s business depended upon the use of "Potomac" at the time you left the firm?

A. With those firms it was everything.

Q. About what proportion of their business?

A. I have no idea.

Q. One-half?

A. I could not tell; they were doing a large receiving business; this was another line of business entirely.

Q. Give me some idea. State, as nearly as you can, what proportion of that particular line of business depended upon the use of the brand "Potomac?"

A. I have no idea; they did a very heavy business in "Potomac."

Q. The reputation of the brand "La Favorita" was of no particular importance for some time after you left the firm of Holt & Co., as I understand you to say?

A. I do not think it was.

Q. When did it come to be valuable as a brand—how many years ago, as nearly as you can state?

A. I have no idea.

Q. What is your best judgment?

A. I have not the least idea. I have been using it for thir-
143 teen years; other parties have been using it for ten years or eight years, so it got to be known all over all parts of the country.

The latter part of the answer is objected to by the complainants' counsel as irresponsive.

The WITNESS: Then strike it out; it does not make any difference.

Mr. MCCUTCHEON: No; let it stand.

Q. It was not a brand of any particular value ten years ago, was it?

A. I cannot tell that; of course, it was of great value at that time, because I was selling a great deal of it then.

Q. Do you mean to say that you gave the brand its value?

A. It was valuable when I left Holt & Co.

Q. It was valuable, then?

A. Yes. Do you mean "La Favorita?" No; I got "Potomac" mixed up with it.

Q. The "La Favorita" was not of any particular value ten years ago, was it?

A. I do not know.

Q. You do not think it was, do you?

A. Ten years ago? Yes.
Q. Could you fix a money value on it at that time?
A. I could not.
Q. Was it worth $500?
A. I should think so, by all means.
Q. Was it worth $1,000?
A. No; it was if one man could use it, but everybody could use it.

Complainants' counsel objects to the answer as irresponsive.

Q. Did Mr. Rowland use the brand "La Favorita" after you dissolved?
A. He did.
Q. To what extent did he use it?
A. He and I were good friends, so I have no idea about it.
Q. You did not think he had any right to use it, did you?
A. If nobody objected. I did not object to his using it. I did not say a word to him about it.
Q. Do you think you had any right to object?
A. Not without Robert S. Holt going with me.
Q. You and Robert S. Holt owned the brand, you thought?
A. I thought we did at that time.
144 Q. It is set up in the answer, and I understand you to have stated, that you claim that "La Favorita" is one of your trade-marks; what do you mean when you say, if you have so stated, that "La Favorita" is one of your trade-marks?
A. As I said a little while ago, I do not remember whether I made that statement in the answer.
Q. When you were asked whether you were one of the originators of the brand "La Favorita" you answered, "I was then; it was originated in 1861;" will you please explain that answer; do you mean to say that you were one of the originators of the brand "La Favorita?"
A. I explain that answer by what Holt & Co. have sworn to in their application to Washington; it was done in 1861, and in 1861 I was one of the firm; of course I was one of the originators.
Q. Then your statement to that effect is based upon what you read in Holt & Co.'s specification forming a part of their application for registration?
A. Yes.
Q. Do you know that the brand was not originated prior to your entering that firm?
A. I do not; I have no idea about it.
Q. You do not remember whether it was used in the period from 1855 to 1861, when you were a clerk in the employ of Holt & Co., or not?
A. I do not remember.
Q. It may have been, may it not?
A. It may have been.
Q. You will not say that it was not?
A. I will not.

Q. When you say that the brand "La Favorita" is one of your trade-marks do you mean to say that you and Robert S. Holt alone have the right to use it as a brand for flour?

A. I do not, now.

Q. Why do you say you do not "now;" why do you use the word "now?"

A. Because I think it is public property.

Q. When did you change your view with regard to it; when did you first believe that it was not a trade-mark, but was public property?

A. I do not remember that.

Q. Recently?

A. No.

Q. How long ago?

A. I would not say, because I have never objected to anybody using it; nobody has ever objected to my using it till lately.

The latter part of the answer is objected to by complainants' counsel as irresponsive.

Q. Do you remember at what time of the day you had the impression of the brands of Holt & Co. taken?

A. Not the least.

Q. You have no idea at all?

A. No.

Q. Were these impressions destroyed, or do you know?

A. They were destroyed by fire when we had our fire.

Q. Have you any recollection of Mr. Holt assenting to your using any of the brands formerly used by the firm?

A. I do not.

Q. You have no recollection on that subject whatever?

A. None.

Q. Have you any knowledge of the firm of Holt & Co. placing the name of other houses on the flour in connection with the words "La Favorita?"

A. I am not positive.

Q. You will not say they have?

A. I do not know.

Q. Did you not know for years prior to the commencement of the suit that Holt & Co. had notified the trade and public that they claimed the exclusive right to use the words "La Favorita" as a trade-mark on flour?

A. I do not think they ever did; I do not think they ever did from me.

Q. Do you mean to say that you had no knowledge of the fact that they claimed it as one of their trade-marks?

A. Never.

Q. You had no knowledge whatever of this fact prior to the commencement of this suit?

A. Only by the letter we received from them after they received their trade-mark patent.

Q. And that was something like a year ago?

A. I think so.

146 Q. Did you not see announcements in the papers—cautionary notices—in which they set forth that the brand "La Favorita" was one of their brands?

A. Never, to my knowledge.

Q. This brand "La Selecta" you remember its being used before you left the firm of Holt & Co.?

A. Yes.

Q. Was it used to a considerable extent?

A. Very slightly, I think.

Q. Do you remember on what flour it was used particularly—that is, who were the principal customers?

A. The grade was like the "Potomac."

Q. Do you remember the firm of J. C. De Ulier?

A. I do.

Q. Do you remember that they bought "La Selecta" largely?

A. I think they did; a good deal.

Q. Do you remember the name of the estate from which you bought the brand "La Selecta?"

A. It is a hard name to spell. I know the man very well.

Q. What is his name?

A. I cannot even remember his name. I was not very intimate with him.

Q. Did you buy the brand from him before or after the charges were preferred by Messrs. Holt & Co.?

A. After.

Q. After the charges were preferred; you are positive about that?

A. Yes.

The time for the taking of testimony on both sides is extended until August 1st, 1883.

Adjourned to June 4, 1883, at 1 p. m.

147 Examination of SAMUEL ROWLAND, a witness produced by respondents.

Examined by Mr. HULL:

1 Q. What is your name, age, residence, and occupation?

A. Samuel Rowland; age, thirty-three; flour merchant.

2 Q. How long have you been branding flour "La Favorita" in your house?

Complainants' counsel objects to the question as being immaterial and irrelevant; the objection to stand to all further questions of similar nature without repetition.

A. Our firm has branded it since its origin in 1872, and the house I was with during three years prior to that date.

3 Q. Were you ever notified by Holt & Co. not to use the brand?

Same objection.

A. No, sir; unless a notice sent by Holt & Co. some time last summer could be so construed.

4 Q. The house that you was with was Rowland & Ryder, was it not?

A. Yes, sir.

5 Q. Was that house ever notified by Holt & Co. not to use the brand?

Objected to as before and as incompetent.

A. Not that I knew of.

6 Q. How long has the brand "La Favorita" been used in the trade?

Same objection.

A. I don't know; as far back as I remember.

7 Q. Was it ever used in St. Louis as early as 1855?

Objected to as before; also on the ground that it calls for proof of a defence not raised by the answer; also as being leading and incompetent.

A. I have heard of its being made there about that date for the export trade especially.

Answer is objected to by complainants' counsel as secondary evidence and hearsay.

148 8 Q. By whom?

Same objection.

A. By a mill or some mills in which Mr. Eldrige Goddard was interested, and perhaps others.

9 Q. Was it Eldridge or Eldrige?

A. Eldrige, I think; he is well known there.

Cross-examined by Mr. ROWLAND COX:

10 X Q. You are still using the brand "La Favorita" on your own flour, I understand, are you not?

A. We are using the words "La Favorita" as we have been.

Latter part of answer is objected to by complainants' counsel as irresponsive.

11 X Q. To what extent have you used the brand "La Favorita" on your flour?

A. I could not say.

12 X Q. Why not?

A. Because I don't remember how often.

13 X Q. Can't you give me some idea?

A. When we have had orders.

14 X Q. That does not answer the question; how frequently have you had orders?

A. I could not say without reference to the books.

15 X Q. Can you give me no idea at all of the extent to which you have used it without looking at the books?

A. To a moderate extent.

16 X Q. What do you mean by a moderate extent?

A. Not as much as others which we have.

17 X Q. Do you mean by that you sold less "La Favorita" of your own packing than any other brand?

A. Not necessarily.

18 X Q. Do you mean you have sold less or not?

A. Not less than some.

19 X Q. About how many shipments have you made this year?

A. I don't know.

20 X Q. Can you swear you have made one?

A. Do you mean by that sales?

21 X Q. Sales in shipments?

A. Yes, sir.

22 X Q. More than one?

A. Yes, sir.

23 X Q. How many can you be positive about?

149 A. I remember two; I can't tell about more without the books.

24 X Q. Give us the date your firm was formed.

A. February 1, 1872.

25 X Q. When did you go into the employ of Rowland & Ryder, and in what capacity?

A. About the time they started, as general confidential man.

26 X Q. You were how old at that time?

A. Nineteen.

27 X Q. Had you had any experience in connection with the business in which the firm was about to engage?

A. Yes, sir.

28 X Q. Can you give us the exact date when you entered the employ of Rowland & Ryder?

A. I think it was February or March, 1869.

29 X Q. Can you mention the name of any person to whom a sale of "La Favorita" flour was made by the firm of Rowland & Ryder during the year 1869?

A. Only by reference to the books.

30 X Q. Question repeated and the witness is requested to give a responsive answer.

A. By reference to their books I suppose I can.

The supposition of the witness objected to as incompetent and the examiner is again requested to repeat the question.

31 X Q. (Question repeated.)

A. I don't remember such details occurring at that time.

The answer is objected to as being irresponsive, and the examiner is again requested to repeat the question.

32 X Q. (Question repeated.)

A. I have an impression to a number of parties to whom that flour was sold about that time.

Answer objected to as incompetent and irresponsive.

33 X Q. Will you please answer the question which has now been put to you six or eight times or decline to answer it?

And examiner is requested to repeat the question.

Question objected to by defendants' counsel on the ground
150 that it has been repeatedly answered by the witness according to the best information he now has.

A. I have already told you that I did not remember such details

Complainants' counsel objects to the answer as irresponsive, especially in view of the fact that the attention of the witness has been particularly directed to what the question calls for.

34 X Q. You have been asked whether the brand "La Favorita" was used in St. Louis as early as 1855; you have no personal knowledge of its having been used as early as 1855, have you?

A. Only from what I have heard.

35 X Q. You don't know yourself, of your own knowledge, that it was used prior to your being connected with the firm of Rowland & Ryder?

A. Only as I have learned of it from others.

Complainants' counsel gives notice of a motion to strike out all the testimony of this witness which has relation to a use of the words La Favorita at St. Louis on the ground that it is merely hearsay and conjecture on the part of the witness.

ALBERT H. BOWMAN, a witness produced on the part of the defendants, being duly sworn, deposes and says:

1 Q. State your name, age, residence, and occupation.

A. Albert H. Bowman; age, 39; residence, 203 Sixth avenue, Brooklyn, and occupation, grain and flour broker.

2 Q. How long have you been in this business as clerk or otherwise?

A. Since the fall of 1859.

3 Q. How long have you known the brand of flour called La Favorita?

Complainants' counsel — as in the case of the last witness, the objection to stand to all similar questions without repetition.

A. I should say twenty years.

151 4 Q. When you were in the business as a clerk did the house that you were with receive the brand from any point in the West?

Objected to as leading and suggesting an answer to witness; question withdrawn.

5 Q. From what points other than New York city was the brand received by any house that you were with?

Same objection.

A. The brand was represented as coming to us from La Porte, Indiana.

Answer objected to by complainants' counsel on the ground that it contains secondary evidence.

6 Q. How long was this?
A. I have no distinct recollection.
7 Q. What is your best recollection?

Objected to as incompetent.

A. I should say from fifteen to twenty years ago.
8 Q. Did you ever know of any objections being made by Holt & Co. to selling the brand by any parties?
A. No.

The question and answer objected to by complainants' counsel as incompetent and for reasons before stated.

JAMES C. THOMPSON, a witness on the part of the defendants, being duly sworn, deposes and says:

1 Q. What is your name, age, residence, and occupation?
A. My name is James C. Thompson; age, thirty-four; residence, Englewood, New Jersey, and occupation, book-keeper.
2 Q. With what house?
A. W. H. Robeson & Co., dealers in flour.
3 Q. How long have you known the brand "La Favorita" in flour?

Objection by complainants' counsel as in the case of the last witness, the objection to stand without repetition to all similar questions.

A. About fourteen years.
152 4 Q. From whom did your house first receive the brand?
A. John P. Early, La Porte, Indiana.
5 Q. Do you know of any objections ever having been made by Holt & Co. to the use of the brand?

Objected to as incompetent and for reasons heretofore given.

A. Not to my knowledge.

Cross-examination by Mr. Cox:

6 X Q. Has the firm of W. H. Robeson & Co. ever used the brand "La Favorita" on flour which they have packed?
A. They never packed any flour.
7 X Q. Then they have not?
A. No.

GEORGE B. ROBINSON, a witness produced on the part of the defendants, being duly sworn, deposes and says:

1 Q. State your name, age, residence, and occupation.
A. George B. Robinson; age, 41; residence, Bedford Station, Westchester county, N. Y., and occupation, flour merchant.
2 Q. How long have you been in business as a flour merchant?
A. Since 1867.

3 Q. Have you known the brand "La Favorita" on flour, and for how long?

A. I have for probably twelve years.

4 Q. Did you ever have a conversation with Mr. Busby, one of the complainants, about that brand; and, if so, when?

A. I did, as near as I can remember, about 1878. I can't tell the exact date without reference to my books.

5 Q. What did you say then, and what did he say to you?

A. Most of the conversation was in regard to the brand "Potomac;" but before leaving I asked Mr. Busby who was the real owner of "La Favorita," because there were a number of brands of that name. Mr. Busby answered that he thought Holt & Co. were the owners, but they did not know. I asked him then if they were the owners
153 why they did not assert their rights. He said, We will see about that. That is the only conversation of which I have any recollection.

6 Q. How long have you been branding flour "La Favorita?"

Objected to by complainants' counsel for reasons before stated, the objection to stand to other questions without repetition.

A. I think we used the brand about that time—about 1878, I think.

7 Q. Did you so used the brand in consequence of this conversation?

A. No, sir.

8 Q. Had you used it before?

A. No, sir.

9 Q. Have you ever had any objections made by Holt & Co. to your use of the brand?

A. I received a letter from them last year, in the summer, I think, of 1882, informing me that they had instituted proceedings by the advice of a lawyer. This was either verbally communicated to me or by a letter.

10 Q. Before you used the brand had you purchased flour so branded; and, if so, of what houses?

A. Yes, sir. I had bought it of Holt & Co., and of Robeson & Co., and of Oscar Ryder, and I had bought flour and put it in the house of Mr. Rowland and he had branded it "La Favorita" for so much royalty, which I paid him.

At this point the witness stated: "I wish you would ask me what motive I had in using the brand "La Favorita."

Adjourned to Friday, June 8th, 1883, at 1 p. m.

154 NEW YORK, *June* 8, 1883.

Present: Counsel as before.

GEORGE B. ROBINSON.—Direct examination continued by Mr. HULL:

Q. Who have been using the brand Favorita since you have known it?

Objected to by complainants' counsel as looking to a defense not made in the answer and as immaterial and irrelevant. The objection will stand to all further questions of a similar character without repetition.

A. Who have sold it, do you mean?

Q. As purchasers or sellers.

A. As to purchasers, I would have hard work to tell exactly who bought it; I have known some parties; I could tell those simply whom I have known to purchase it. That is all, as far as I can remember.

Q. Give us the names of those who have manufactured it or sold it.

A. To my knowledge, Holt & Co., Rowland & Co., Roberson & Co., S. Oscar Ryder & Co., Austin Nichols & Co., I have sold some of that brand.

Q. Did it ever come from any house in the West that you know of?

Objected to by complainants' counsel as before.

A. The only people from whom I purchased it—that is the only way I could find out—are Roberson & Co. and F. W. Maullin & Co. I think that was the style of the firm at that time; there have been some changes in it.

Q. Where did this house do business—Maullin & Co.?

A. At 17 Moore street, I think.

155 Q. Did you ever know of any house in the West manufacturing it?

A. Not of my own knowledge.

Complainants' counsel gives notice of a motion to strike out all the evidence of the witness having relation to the manufacture of flour in the West under the name of La Favorita.

Q. What motive did you have in using the brand La Favorita?

Objected to as incompetent, immaterial, and irrelevant.

THE WITNESS: I don't know as I ought to have made that suggestion the other day.

Mr. HULL: Everything you say will be put down, and if you do not want anything put down do not say it.

A. I have no objection. I found that houses from whom I had purchased it—purchased the mark—were making representations to my customers, and, finding there were so many Favoritas, with the approval of my customers I made the brand for them for their orders.

Complainants' counsel, not waiving the objection heretofore made to the testimony of this witness, cross-examines him as follows:

Cross-examination by Mr. Cox:

Q. Will you have the kindness to explain your last answer. Give us your reasons for using the brand "La Favorita" more at length.

A. Well, I found there were so many Favoritas and representations were being made to my customers which I was satisfied were not—at least were false, as far as I was concerned.

Q. Please give us the substance of those representations which you say were false, as far as you were concerned.

A. Well, from one concern the representation was that they owned the Favorita; that I got it all from them.

156 Q. What firm was that?

A. I would rather not specify names unless it is necessary.

Q. Why do you decline to specify the name of the firm?

A. Because most any house in the flour business I found making such statements from time to time.

Q. What do you mean by that? I do not understand.

A. Well, for instance, if Holt & Co.'s salesman was put in contact with a buyer of Favorita, and having sold Mr. Robinson two or three years before that, he might say they were selling Favorita to Mr. Robinson and they had better buy it of them direct; such statements have been made repeatedly, to my knowledge, to Roberson & Co., and to Mr. Ryder, and such statements have been made to me.

Q. The substance of those representations was, as I understand you, that you had purchased the flour——

A. Of them.

Q. You mean of Holt & Co.?

A. I had done it years before.

Q. You mean that the representations to which you have referred in your testimony were to the effect that you had bought this flour—this La Favorita flour—of Holt & Co.?

A. Well, I won't specify immediately at that time, but that I had bought at some time or other of them.

Q. Were not these representations true?

A. I think so; I think I had.

Q. Then, if they were true, why should you put up La Favorita for yourself?

A. I won't specify that this house was guilty in this particular instance at the time of changing the brand, but such representations were made, and the customer, in two cases, brought me written representations—representations in writing—that I was buying the Favorita of them, and that they would sell them direct; therefore, as I was not paying them a royalty, not to have any quarrel about the brand, they made me mix it—forced me to it; if you have a

157 dozen brands you can't claim any ownership and everybody using them right direct.

The expressions of opinion on the part of the witness are objected to by complainants' counsel as incompetent and immaterial.

Q. As nearly as I understand you, what you call your "motive" for putting up La Favorita flour was that it had been untruthfully represented that you were buying the flour from parties from whom you were not buying it; is that right?

A. No, sir; one of the representations was truthful, that I was buying of them, but decency required that they should keep away from the customers when they knew that I was making a profit on it—in any business.

Q. And because they did not behave decently you put up La Favorita flour for yourself?

A. I believe I behaved perfectly proper by putting up Favorita; it was not an infringement on anybody.

Q. What house was that?

A. That was Mr. Rowland or one of his firm.

Q. And you put up the flour with their approval, you say?

A. They never made any objection, because they put the brand, as I testified the other day, on the flour without looking at it.

Q. Why should you go to them; did you think they had a right superior to yourself?

A. I went to them because the brand existed in five or six people's hands, and I chose to go to them rather than take the trouble of making one myself.

Q. And you were willing to pay a royalty rather — have——

A. I was willing to pay a royalty rather than raise the question.

Q. What do you mean by "raise the question?"

A. If I know that any house has a brand of flour that they are selling, and if I think that they had the brand before me, I would buy it of them rather than make the brand.

158 Q. That was the reason why you paid the royalty in the case of "La Favorita?"

A. Yes; to Rowland.

Q. Did you believe that Rowland & Co. owned the brand when you paid them royalty?

A. I did not believe they had an exclusive right to it. I knew they had a brand.

Q. You knew they had claims superior to yours, did you not?

A. I did not, in law; in courtesy they had.

Q. Their claim was so far superior to yours, however, that you were willing to pay them for the privilege of using the brand?

A. I was willing to pay five cents a barrel for the branding of it.

Q. When did you first pay them for the privilege of using the brand?

A. As near as I can remember, it was in 1877 or 1878. I have not referred to any books; I am only speaking from memory.

Q. Have you any means of fixing the date definitely?

A. I think that by rummaging over some boxes of books I could find —.

Q. Do you know whether you could or not?

A. I don't know, but I think I could.

Q. Can you not give me some definite time?

A. I cannot without looking over those books. I might by opening the boxes and looking in the books where the entries were made of purchases or the payment for the branding.

Q. Has it been your custom to pay other people for using their brands?

A. I generally buy the brand; if I know they are the exclusive owners of them I buy the flour. Most people don't let other people elect the flour unless they put their own brand on it.

Q. But Rowland & Co., I understand, did?

A. They did in the case of Favorita.

Q. Where did you acquire the impression that Rowland & Co. had a superior right to this brand, La Favorita?

A. I did not acquire any such impression.

159 Q. Why, then, did you pay them for the use of it?

A. Because they said they had the brand Favorita. It would cost $2.50 or $3 to cut a brand, and I didn't know that I would ever have an order for it again, and I didn't want any bother about it.

Q. Then the only reason why you paid them a royalty was in order to avoid the expense of cutting a brand?

A. No, sir; I didn't say so.

Q. What was your reason?

A. I said I got it of them because I did not know that I should have other inquiry for the flour at the time I first bought it of them.

Q. How many times did you pay them a royalty for it?

A. Vey few times. I don't remember the times; perhaps three or four times; 25 or 50 or 100 barrels—a very small item.

Q. And the second time you went to them did you do so with the conviction that you would avoid the expense of having a stencil cut by paying a royalty?

A. No, sir.

Q. What was the reason you went the second time?

A. I was willing to go and buy it of them rather than have to go and make a brand.

Q. The third time, how was it?

A. The same reason. You never know when the orders will stop. I have not had an order for six months now, and the orders might stop at any moment.

Q. Do you mean to say you have not had a single order for La Favorita flour within six months?

A. I don't remember any now. There may have been some little orders, but I don't remember.

Q. And before that time what were the intervals between the orders for it?

A. Very seldom I had any; very small orders. Only on occasion that I would have an order. They were generally very small orders, too.

Q. There is a great deal of La Favorita flour sold, is there not?

A. I can't say; I don't hear anything much of it.

160 Q. Do you know that Holt & Co. do a very large business in La Favorita flour?

A. I presume they do a very large business, but they sell a great many brands of flour; so far as I have any knowledge at all of their business, of my own knowledge I can't say about their business.

Q. Is it not your judgment that they sell a very large quantity of La Favorita brand?

A. My judgment is that they do not sell much of it—that they do not sell very largely of it; that would be my judgment, but it may be entirely narrow.

Q. Did you pay royalties to Rowland & Co. after the conversation with Mr. Busby, of which you have spoken in your testimony — chief?

A. That I can't say; I think it was about that time; I think probably I have paid it since, but I think it was about that year— 1878—when I did it, if my recollection is correct on the subject. I have not referred to any papers.

Q. Your recollection is, however, that you have paid a royalty since that conversation?

A. It is possible; I don't like to say. I know I stopped it very short when I found people that I was paying a profit to would go to the house and try to take the order away from me for a paltry five or ten cents.

Q. You mean to say that you commenced the use of "La Favorita" in a spirit of resentment?

A. Not entirely; as far as Rowland & Co. were concerned, yes. I had no earthly resentment against Holt & Co.; if I had I could have sold thousands of barrels where I sold one.

Q. In regard to this conversation of which you have spoken, which took place between yourself and Mr. Busby, do I understand you to say that there was but one conversation?

A. I remember only one; Mr. Busby came to see me about Potomac flour.

Q. You remember but one, you say?

161 A. I remember only that conversation, and I think Mr. Busby and myself were quite good friends in those times, and he may have spoken a few words to me about flours, but I don't remember anything that could be called a serious conversation on the subject.

Q. You have on your mind, however, one particular conversation that took place, have you not?

A. I have on my mind this conversation on "Potomac," in which I spoke of "Favorita" myself. I introduced it in the way I swore the other day. I don't deny the conversations with Mr. Busby in regard to business. I had many conversations, but I don't remember anything in regard to those brands.

Q. What do you mean by those brands?

A. "Potomac" and "Favorita." Once Mr. Busby came in in regard to the brand "Potomac," and I spoke of "Favorita" in the way that I have told when he was leaving.

Q. Is that the only conversation you remember in which "La Favorita" was referred to?

A. The only one I remember. I never had any question with Mr. Busby at all that I recollect.

Q. Please reflect and answer the question again: Was that the only conversation which took place between you and Mr. Busby in which "La Favorita" was referred to?

A. The only conversation I could swear to in which I could swear that there were those words used.

Q. Do you mean to say that other conversations did not take place?

A. I did not say so. I distinctly say I would not deny if Mr. Busby swore to a dozen of them.

Q. Do you mean to say that if Mr. Busby has stated that he had notified you a dozen times that La Favorita was the property of Holt & Co. you would not deny it?

A. Well, I should say Mr. Busby must stretch his conscience very heavily if he swore to it a dozen times or half a dozen times.

Q. Suppose he said three times?

162 A. Even then I would not deny him; but that he notified me, seriously or formally, that I should not do it, I will swear that he never did it until, in writing, last summer; that is as distinct as I can make it; you ask me a question that is rather stretching matters; if you said once, twice, or three times—but that the man ever spoke of it seriously that they were the exclusive owners, I say, no, sir.

Q. You have been sworn in this case?

A. Yes.

Q. Will you swear that Mr. Busby never stated to you in substance and effect that "La Favorita" was the property of Holt & Co.?

A. In substance and effect they may have said that they thought that they were; as I said the other day in that conversation, I admit that he said he thought the firm of Holt & Co. were, and I said: "Why don't you take action," and not have a number of people using it?

Q. To which he replied, What?

A. "Well, we'll see about that," or something of that kind. The sequel proves that they never did anything; it sustains the truth of my oath, though, perfectly.

The conjectures and conclusions of the witness involved in the last answer and the answers preceding are objected to by complainants' counsel as irresponsive, incompetent, immaterial, and irrelevant.

Q. What was the occasion of Mr. Busby's referring to the Potomac brand; had you been using it?

A. The occasion was that I had two or three small orders for Potomac.

Q. Did you pay anybody a royalty for using it?

A. No, sir; I had a tenant in 7 & 9 Water street, William H. Fleeman, who had a brand "Potomac," and after asking my customer if that flour would do I purchased several times little orders or got permission to use the brand; I don't think there was any purchase from him.

Q. Did you know at the time that the Potomac brand was the property of Holt & Co.?

163 A. I did not, sir; I was innocent—that is, as far as any exclusive property was concerned, but I knew they had a brand "Potomac."

Q. And you knew it was one of the most popular and salable brands in the market, did you not?

A. I did not, sir; I decline to swear so; that is where I was ignorant at that time.

Q. Mr. Busby called to see you upon more than one occasion about your use of the brand "Potomac," did he not?

A. No very serious visit, except that one in which he appealed to me as a gentleman and showed me the position of their brand, and he remembers exactly the way I met him.

Q. The former visit when he came to see you and protested against your using the brand was, as you express it, a visit that was not "serious" in its character?

A. I don't remember any former visit on Potomac.

Q. Will you say that he did not find it necessary to caution you *of* number of times as to the use of the brand Potomac on flour packed by yourself?

A. He may have told me that they owned the brand Potomac; I don't deny that. I think I bought a brand "Potomac" of Mr. Busby; I think I bought it a number of times of him in those times.

Q. Did he not have to caution you a number of times not to use it on flour of your own packing?

A. I never had anything that you would call a caution. He may call it a caution, but it was not a caution at that time. If he put it in the way of a caution, ignorant as I was at the time, I would have paid no attention to it. If he had come to me and showed me the position, and asked me not to use it, and showed me that they had a prior right, I would have said yes, and I would not have sold a barrel of it afterwards. I was not paying any attention to law or caution in the matter.

Q. And you pursued this honorable course, I understand
164 you to say, the first time he ever spoke to you on the subject?

A. The first time there was anything serious; he may have spoken to me to say that they had the brand, but I never knew anything like an attempt to stop the use of the brand.

Q. He may have told you not to use it?

A. No, sir.

Q. Do you swear that he did not tell you more than once not to use it?

A. I won't swear but what he said it might be his brand, but I am sure he never told me not to use it, because I would have stopped it; but if he had told me in a domineering way not to use it I would not have paid any attention to it.

Q. Do you think he told you in a domineering way?

A. I think I should have remembered if he had.

Q. Will you swear that he did not speak to you more than once on the use of the brand Potomac on flour packed by yourself?

A. I will swear that he never spoke anything particular of attempting to stop the use of it. I don't say but what they claimed that they were the Potomac owners a few days before that or about that time; but that he requested me not to use it in any formal spirit or a spirit attempting to stop it, I will swear he did not.

Q. Will you swear to it positively?

A. I will; because the proof of it was that when he came to me seriously and spoke like a gentleman I stopped it, although some of the largest customers of Holt & Co. were intimate friends of mine, to whom I could sell that brand Potomac, if I wanted to, afterwards.

Q. You say you stopped using it the first time he spoke to you on the subject?

A. I say I did the first time that he formally spoke to me on the subject, with any idea of coming to a conclusion on the subject. I won't *to* say but that he made remarks on the subject, as he did to Mr. Rider, "This is my brand," or something of that kind.

165 Q. Who do you think has the best right to the La Favorita brand?

A. I am not competent to express an opinion; I don't know where it originated or started; I am trying to get light on the subject. My answer to Holt & Co., when they first advised me as to stopping the use of the brand last year, was that I would be very glad to know who owns this brand.

Q. Do you know to what extent this brand has been used by Roberson & Co.?

A. I cannot say that I know; I bought a good many barrels of flour years ago with that brand on from Roberson & Co.

Q. How many years ago?

A. I do not say that I could say exactly, but it has been some time.

Q. Have you bought any lately?

A. No, sir; I have not seen it in their hands lately; I have not seen it on the exchange; I may say, though, they have offered to sell the brand Favorita, if that is any help to you; I don't think they will deny it; they have offered it for sale, and I think you can buy it of them now.

The closing portion of the answer is objected to as irresponsive, immaterial, and irrelevant.

Q. Do you know of your own knowledge that Austin, Nichols & Co. have ever put it up?

A. I have not seen the barrels, and I can't.

Q. Then you do not know of your knowledge that they have?

A. Well, I do not know that I ought to say of my own knowledge. I have seen people that have got it from them, and I have had the statements of some of their concerns that sold it. If that is not my own knowledge, that is as near as I can get.

The answer is objected to by complainants' counsel as containing incompetent evidence, and notice is given of a motion on the part of complainants' counsel to strike from the record all the evidence of the witness having relation to the use of the words La Favorita by Austin, Nichols & Co.

166 Q. Have you any personal knowledge of the fact that the brand has been used by S. Oscar Ryder?

A. Yes; I have bought it of them.

Q. When?

A. Several years ago; I don't know of it lately; I don't think I have bought it for several years.

Q. What were the other firms whose names you gave?

A. Maullin & Co. received the Favorita.

Q. Do you know how long a time they have received the brand?

A. They received it several years ago for some time; I couldn't say how long.

Q. You do not know of your own knowledge anything about it, do you?

A. I know I bought a good deal of it from them.

Q. When?

A. Several years ago; I think later than 1880 or 1881; it may have been in 1881; some——

Q. You cannot be sure, however, that it was?

A. I can only speak from recollection; I have not referred to any books on the subject.

Q. I understand you to say that the brand "La Favorita" is not recognized as being a popular brand?

A. That I cannot say; I did not say that, sir.

Q. Do you know it to be?

A. It is not a popular brand in New York; it may be in some other markets.

Q. Is there not a great deal of it sold in New York?

A. Sold in New York for foreign shipment; I don't think that for consumption it is at all.

Q. Is it sold largely for foreign shipment?

A. It has been; I don't know whether it is now.

Q. What do you mean by that; for how many years?

A. For the last year my knowledge of it is very slight.

Q. You think the sales have fallen off during the last year?

A. I can't say that; but I say I don't think so much of it
167 is sold; but I may be entirely in error, because I have not kept the run of the business where they used to use so much of it.

Q. Have you sold any Potomac since Mr. Busby cautioned you, as you express it, "formally," not to do so?

A. I have sold it, but not of my own; I have not branded it; it was not a caution; it was an understanding or agreement made with Mr. Busby; there was no caution about it; I did not do it in pursuance of any legal notice; I simply did it because of a conversation with a friend, and I did not want it put in the position of a caution; I never was cautioned that I had no legal right to use the Potomac.

Q. You gave it up, I understand, only from honorable motives?

A. From purely honorable motives; just the same way that I respect the brand of Mr. Ryder.

Adjourned to Friday, June 15th, 1883, at 1 p. m.

168 In the United States Circuit Court for the Southern District of New York.

ROBERT T. HOLT *et al. ags't* ALFRED V. RYDER.

It is hereby agreed between the parties to the above-entitled cause that James E. Hereford, Esq., of the city of St. Louis and State of Missouri, and a notary public within and for said State, be regarded in this proceeding and examination as though he were standing examiner in chancery of the court and were named as such in the notice of taking testimony therein, complainant reserving, however, all other objections that may be made to the proceeding and examination as to form and regularity.

S. S. McCUTCHEN,
Complainants' Solicitor.
ASHLEY C. CLOVER,
Att'y for Def't.

169 In the Circuit Court of the United States for the Southern District of New York.

HOLT *et al. against* A. V. RYDER.

STATE OF MISSOURI, } ss :
City of St. Louis, }

Depositions of witnesses, Alexander H. Smith, Elbridge Goddard, Donald Bin, and Hiram W. Bridges, produced, sworn, and examined on the 7th day of August, A. D. 1883, at the hour of nine o'clock a. m., at the office of H. A. Clover, southeast corner of Third and Pine streets, in the city of St. Louis, State of Missouri, before me, James E. Hereford, a notary public within and for said city and State, and acting as examiner in chancery, under and by virtue of the annexed stipulation, in a certain cause now pending in the circuit court of the United States for the southern district of New York, between Holt and others, complainants, and A. V. Ryder, respondent, on the part of the respondent.

ALEXANDER H. SMITH, being produced, sworn, and examined on the part of the defendant, deposes and says:

My name is Alexander H. Smith; my age is fifty years; residence, St. Louis, Missouri; I am in the flour milling business; have been in the milling business as clerk and proprietor for thirty years in St. Louis. I know the firm of Sears & Co. of this city. Mr.
170 Sears' name was S. G. Sears; am not certain that that was the style of the firm. I had no connection with that firm as a firm under that name. The firm of Rhodes, Pegram & Co., of which I was a clerk, were financial agents for the firm of S. G. Sears & Co.; my connection with the firm of Rhodes, Pegram & Co. was prior to the formation of the firm of Alex. H. Smith & Co. I was

in the employ of Rhodes, Pegram & Co. during the entire existence of the firm, from 1851 to about 1859; the firm did business in St. Louis; they were commission merchants and interested in a mill. I was book-keeper, cashier, salesman, and wheat buyer; they handled on commission grain, flour, provisions, teas, coffees, sugar, grain bags, furs, hides, feathers, &c. The business of Sears & Co. was milling exclusively; I am not certain as to whether Rhodes, Pegram & Co. handled any of Sears & Co.'s flour, but am certain that they advanced money and bought wheat for them. I couldn't be positive about the brands made by Sears & Co. at that time, except one, the "La Clide."

Q. State whether or not, if you know, the firm of Sears & Co. ever manufactured a brand of flour known as "La Favorita?"

Complainants' counsel, without waiving his right to object to the examination as irregular, objects to the question as immaterial and irrelevant, as tending to prove a defense not set up in the answer, the objection to stand to all questions tending to prove ownership or proprietorship in the brand in any persons other than the complainants and S. Oscar Ryder, or both.

A. I have no knowledge of it; the firm of Smith & Co., according to my recollection, was formed in 1860; the firm was composed of Alexander H. Smith, George Pegram, and S. G. Sears; the principal business of that firm is milling; they do business
171 in St. Louis. I am the Alexander H. Smith of the firm. I remember the brands of flour made by our firm at that date and shortly after; they were——

Q. Will you name the brands made by your firm?

Same objection as before.

A. "Brilliant," "Tropical," "La Favorita," "Favorite," "Champion," and other brands.

Q. When did your firm first begin to manufacture the brand "La Favorita?"

Same objection as before.

A. In 1860; we manufactured flour under that brand occasionally during the existence of the firm—eight or nine years. I mean by occasionally this: we oftener used the English word "Favorite" instead of the foreign title "La Favorita." This flour went mainly to Spanish American markets, Cuba, South America, and largely to New Orleans, as well as to New York occasionally; the largest handlers of that flour in this country was a New York firm, Watts, Crane & Co., and a New Orleans firm of Keep & Caulfield, and a Philadelphia firm, which I cannot remember. I could not give an estimate of amount of flour made under that brand; that was one of our regular brands of flour. I could not say whether any of this brand of flour was put on the home market for home consumption.

Q. State whether or — any other milling firm ever put flour of that brand on the market.

Same objection as before.

A. I can't answer that question from my own knowledge or recollection.

Q. State whether — not the words "La Favorita" were used to designate a certain grade of flour.

Same objection.

A. It was always used on a certain grade of flour.

Complainants' counsel, without waiving any objections to the regularity of the proceedings, cross-examines:

172 When I say that Watts, Crane & Co., Keep, Caulfield & Co., were large handlers of this brand; I mean both the brands "Favorite" and "La Favorita" and others. I am not disposed to be very positive about anything that happened 20 or 25 years ago; I have always thought that I originated this brand myself. I know that when I had the brand cut I thought no one else had it; that was as near as I can locate it, in 1860; it might be 1861; at that time our mills were the Laclede, Atlantic, and Empire—three mills; the Laclede mill was the one that had been owned and run by Sears & Co.; it came to us from them; we owned the Laclede mill during the existence of the firm, up to about 1869; the flour branded "La Favorita" was the same as that branded "Favorite;" we branded this flour occasionally only "La Favorita." I cannot say that the brand has acquired a firm hold on the trade up to the time my connection with it ceased. The Laclede mill does not now belong to us; it is owned by J. B. M. Kehlor; my connection with the brand ceased when the mill was sold to Mr. Kehlor. I could not say that particularly that this "La Favorita" brand passed with the mill, but other brands, supposed to belong to the mill, did pass; my recollection is that the sales of the brand "La Favorita" were not extensive; since the sale of the mill to Mr. Kehlor, I have no knowledge as to whether this brand is sold.

Q. Is it not probable that you regarded the "La Favorita" brand as going to Mr. Kehlor with the mill?

Objected to as irrelevant, incompetent, and immaterial.

A. Yes; I cannot swear that I have known of a sale of "La Favorita" flour within 20 years; I do not regard the "La Favorita," to which I have referred in my testimony, as a living brand.

Q. If there be such a brand who, in your opinion, owns it?

173 Objected to as incompetent, irrelevant, and immaterial.

A. If the brand referred to in my testimony is in existence to-day, that particular brand belongs, in my opinion, to J. B. M. Kehlor, the present owner of the Laclede mills. I know the signature of of J. B. M. Kehlor as well as I know the signature of any one else I have been in business with; the signature to the paper shown me is in the handwritting of J. B. M. Kehlor.

Paper handed notary and hereto attached, marked Exhibit "A."

Redirect examination:

Our flour, or some of it, intended for the Spanish American and Southern American markets, passed through New York. We did not ship most of "La Favorita" to Spanish American markets. I cannot say of my own knowledge that we shipped "La Favorita" to Spanish American markets; I can't say positively that we shipped it to New York city; my recollection is mainly of the leading brands that we were shipping, such as "Brilliant," "Tropical," "Champion," and "Favorite;" my recollection of shipments of "La Favorita" is very indistinct; the brand, when it was cut, was designed for Spanish American markets and South America; it was an attempt to put the flour in their own language; my recollection is that we preferred the English word. I cannot recollect that this brand of "La Favorita" was made at any other mill than the Laclede; when the Laclede mills were sold to Kehlor my recollection is that one brand of flour was specified and others understood to pass. I cannot undertake to say what was said, except that the leading brand "Brilliant" passed formally with the mill; the others were not thought of sufficient importance to make a transfer of.

174 Q. If after you had sold the Laclede mill you had received an order for "La Favorita," would you have filled it?

A. No, sir.

Objected to as immaterial and irrelevant.

ALEXANDER H. SMITH.

Subscribed and sworn to before me this 7th day of August, A. D. 1883.

[NOTARY'S SEAL.] JAMES E. HEREFORD,
Notary Public.

ELDRIDGE GODDARD, being produced, sworn, and examined on the part of the defendants, deposes and says:

My name is Eldridge Goddard; residence, St. Louis; am about 63 years of age; I am a merchant miller; I have been in the milling business about 27 years; I know the firm of S. G. Sears & Co.; the firm was composed of S. G. Sears, Charles Whitmore, and myself; they were in the merchant milling business. I remember the brands of flour manufactured by that firm; we used the brand "La Favorita" as a brand for our flour, but used it for occasional use, not as a regular brand. I commenced using it in either 1857 or 1858. I originated that brand myself; I did not use this brand long. I retired from the firm of S. G. Sears & Co. in 1861, and my knowledge of the brand ceased at that time; we got this brand up to send to a small trader in Boston; this flour was shipped to Hinman, French & Co.; that brand was a regular grade that we were making all the time, and just used for that particular house, not for general use among our trade; the name of the mill which made this flour was the "Laclede mill;" I never branded flour "La Favorita"

175 after leaving Sears & Co. Mr. Smith had no connection with the firm at the time I had. I have not known any flour of

that brand on the market since. I don't know whether Sears & Co. made any flour of that brand after I left.

Cross-examination under same objections as before:

I can't say whether Laclede mill was sold to Alex. H. Smith & Co. I retired from Sears & Co. before the sale of the mill. I have not known of any sales of "La Favorita" flour in twenty years; it was not known in the market here.

Q. Do you regard it as a leading brand here?

A. No, sir; it is as dead as Chelsea. When I left the firm of Sears & Co. the right to all brands were left with the firm.

ELDRIDGE GODDARD.

Subscribed and sworn to before me this 7th day of August, 1883.

[NOTARY'S SEAL.] JAMES E. HEREFORD,
Notary Public.

DONALD BIN, being duly sworn, upon his oath deposes and says:

My name is Donald Bin; I reside in St. Louis, Missouri; my age is sixty years; I am an engineer; I knew the firm of Sears & Co., of this city; I was engineer for Alex. H. Smith & Co. from 1858 up to 1867, as long as the firm lasted. I worked for Sears before the firm of Alex. H. Smith & Co. was formed; the name of the mill I worked in was the "Atlantic." I was acquainted with the brands of flour manufactured by Sears & Co. and Alex. H. Smith & Co.

176 Q. Did the firm of Sears & Co. and Alex. H. Smith & Co. ever, while you were working for them, manufacture a brand of flour known as "La Favorita?"

Objected to as immaterial, irrelevant, and tending to prove a defense not set up by the answer.

A. I am not sure whether they did or not; all I know is that I have seen the brand; I have seen it at the Laclede mills and on the wagons going from the mills to the steamboats; I think it was before 1860, but am not sure. The owners of the Laclede mills, when I saw that brand, were Goddard, Sears & Whitmore. I don't remember when I last saw this brand; I could not say whether I have seen this brand of flour within 10 years; I have often seen the brand at that time. I don't think the Atlantic mill ever manufacturad this brand of flour. I know of no other mill manufacturing the brand of flour.

Cross-examination:

Same reservation as before.

When I saw flour marked "La Favorita" before 1860 I was working at the Atlantic mills and not at the Laclede. These mills are about ten blocks apart. I used to go to the Laclede mills often, and in that way saw this brand of flour in the mill. I saw this brand two or three dozen times before 1860; can't swear to the year, but

think it was manufactured from 1858 to 1860. I can't swear that I have seen it later than 1860.

DONALD BIN.

Subscribed and sworn to before me this 7th day of August, 1883.
[NOTARY'S SEAL.] JAMES E. HEREFORD,
Notary Public.

177 My name is Herman M. Bridges; I reside in St. Louis; my age is fifty-three years; I am an engineer. I knew the firms of Sears & Co. and Alex. H. Smith & Co., and was employed by them; commenced working at the Laclede mills in 1857. The proprietors at that time were Goddard, Sears & Whitmore. I was acquainted with the brands of flour made by the mill at that time.

Q. Do you remember whether they branded flour "La Favorita?"

Same objection as before.

A. I have seen that brand used there. I can't say whether it was in 1858 or 1859 when they began to use this brand, but they began to use it about a year after I came there. I don't know how long they continued to use this brand, but I know that they used it. I have worked for Smith & Co.; began to work for them about 1863—as late as 1863. Anyway, I worked for them in the same mill—the Laclede. I don't think Alex. H. Smith & Co. ever used the brand "La Favorita." They afterwards got up the brand "Favorite." I don't know which mill "La Favorita" was made in the second time. I think the last time I saw the brand was in 1863; don't know where I saw this brand last. I saw this brand after I left Goddard, Sears & Whitmore, and I think Alex. Smith made it; don't think — the first time this brand was used. It was not used more than six months, I think, and it was hung up and other brands took the place of it; think last time I saw the brand was in 1863, and I have not seen it since.

HIRAM M. BRIDGES.

Subscribed and sworn to before me this 7th day of August, A. D. 1883.

JAMES E. HEREFORD,
Notary Public.

178 In the Circuit Court of the United States for the Southern District of New York.

HOLT *et al. vs.* A. V. RYDER.

STATE OF MISSOURI, }
City of St. Louis, } *ss:*

I hereby certify that on the 7th day of August, A. D. 1883, before me, James E. Hereford, a notary public in and for said city and State, and acting as examiner in chancery under the foregoing stip-

ulation, at the office of H. A. Clover, southeast corner of Third and Pine streets, in the city of St. Louis, Missouri, personally appeared before me, pursuant to notice and the foregoing stipulation, at the hour of nine o'clock a. m., Alexander H. Smith, Eldridge Goddard, Donald Bin, and Hiram N. Bridges, and S. St. J. McCutchen, Esq., appeared as counsel for complainants, and R. C. Clover, Esq., appeared as counsel for respondent, and the said Alexander H. Smith, Eldridge Goddard, Donald Bin, and Hiram N. Bridges being by me first duly cautioned and sworn to testify the whole truth, and being carefully examined, deposed and said, as appears *to* the depositions hereto annexed; and I further certify that said depositions were then and there reduced to writing by me, and were, after they had been reduced to writing, subscribed by the witnesses, and the same have been retained by me for the purpose of sealing up and directing the same to the clerk of the court as required by law; and I fur-
179 ther certify that the reason why the said depositions were taken was that the said witnesses reside in the city of St. Louis, Missouri, more than one hundred miles from the city of New York, N. Y., the place where this cause is to be tried; and I further certify that I am not counsel or attorney for either of the parties, nor am I interested in the event of the cause; and I further certify that the fee for taking said depositions, $6.80, has been paid to me by the respondent, and the same is just and reasonable.

In testimony whereof I have hereunto set my hand and official seal, at the city of St. Louis, State of Missouri, this 7th day of August, A. D. 1883.

[NOTARY'S SEAL.] JAMES E. HEREFORD,
Notary Public, Acting as Examiner in Chancery.

Flour manufacturers. Office, chamber of commerce. Milling capacity, 3,200 barrels per day.

ST. LOUIS, *August* 6, 1883.

Know all men by these presents that I, James B. M. Kehlor, merchant, of the city of St. Louis, Missouri, being the owner of the Laclede mills, for and in consideration of the sum of one dollar to me in hand paid by Robert S. Holt, Leonard B. Busby, and Charles W. McCutchen, composing the firm of Holt & Co., of the city of New York, do hereby assign, transfer, and set over to said firm of Holt & Co. all my right, title, and interest, if any, of any nature or kind, in or to any certain brand or trade-mark for flour called "La Favorita."

In witness whereof I have hereunto set my hand and seal, at St. Louis, this 6th day of August, A. D. 1883.

J. B. M. KEHLOR. [SEAL.]

Exhibit "A."

[NOTARY'S SEAL.] JAMES E. HEREFORD,
Notary Public.

180 EXHIBIT X. May 29, 1883. J. A. S.

NEW YORK, *Feb.* 1, 1869.

Dissolution.—The partnership heretofore existing between the undersigned, under the firm of Holt & Company, expires this day by its own limitation.

ROBERT S. HOLT.
STEPHEN G. SEARLS.
S. OSCAR RYDER.

NEW YORK, *February*, 1869.

Copartnership.—The undersigned, having formed a new copartnership, will settle all outstanding business of the late firm of Holt & Company, and will continue the business under the same firm name at 57 Water St.

ROBERT S. HOLT.
STEPHEN G. SEARLS.

NEW YORK, *February* 1, 1869.

Copartnership.—The undersigned have this day formed a copartnership, under the name of Rowland & Ryder, for the transaction of the flour and commission business at 64 Water St.

HENRY ROWLAND.
S. OSCAR RYDER.

NEW YORK, *February* 1, 1869.

Received, New York, Feb'y 4, 1871, from Holt & Company, two hundred and fifty-five $\frac{5}{100}$ dollars in full for my share of acct's settled to 1st inst., as per statement rendered.

$255.02. S. O. RYDER.

181 United States Circuit Court, Southern District of New York.

ROBERT S. HOLT *et al. vs.* JOSÉ MENENDEZ *et al.*

It is stipulated and agreed by counsel that the case of the complainants against Alfred V. Ryder be argued with and abide the event of above-entitled cause except as regards the accounting, if any be ordered.

Dated New York, October 10, 1882.

S. ST. J. McCUTCHEN,
Compl'ts' Sol'r.
JOHN HENRY HULL,
Sol'r for Def'ts.

Endorsed: U. S. circuit court. Robert S. Holt *et al.* ag'st Jose Menendez *et al.* Stipulation. U. S. circuit court. Filed Oct.
182 24th, 1882. Joseph M. Deuel, clerk.

183 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court-rooms, in the city of New York, on Wednesday, the fourth day of February, in the year of our Lord one thousand eight hundred and eighty-five.

Present: The Honorable Alfred C. Coxe, judge.

ROBERT S. HOLT *et al. vs.* JOSE MENENDEZ *et al.*

The above-entitled cause coming on for final hearing upon pleadings and proofs—

Mr. Rowland Cox is heard in behalf of complainants.

Mr. John H. Hull is heard in behalf of defendants.

C. A. V.

184 United States Circuit Court, Southern District of New York.

ROBERT S. HOLT *et al. vs.* JOSE MENENDEZ *et al.*

Mr. S. St. J. McCutchen and Mr. Rowland Cox for complainants; Mr. John Henry Hull for defendants.

COXE, *J.:*

This is an action to restrain the infringement of a trade-mark. The complainants are engaged in the flour and commission business in the city of New York under the firm name of Holt & Company. The firm was organized forty years ago, and, with the inevitable changes wrought by time, has continued in the same business ever since. In 1861 they commenced to use, and have since con-
185 tinuously used, to distinguish a certain flour prepared by them, the trade-mark in question, "La Favorita." The trade-mark was registered in the Patent Office February 28, 1882.

The defendants, admitting the use of the name "La Favorita," contend that they are privileged to use it for the reason that the flour sold by them was procured from one S. Oscar Ryder, who, from 1861 to 1869, was a member of the firm of Holt & Company, and thus acquired a right to the trade-mark, which, in the absence of an express relinquishment, he retained after his withdrawal from the firm.

The defendants insist also that the use of the words "La Favorita" as a brand for flour did not originate with the complainants;
186 that, as they use it to distinguish flour manufactured by others and merely selected by them, there can be nothing to support a trade-mark, and, finally, that whatever rights the complainants once had have been forfeited by inexcusable laches in asserting them.

The position that Ryder retained an interest in the trade-mark, after his connection with the firm had been severed cannot be maintained. Holt & Company was a firm of character and influence. For years it had preserved its credit and good name unshaken and unimpaired. The trade-mark "La Favorita" was originated, so far

at least as the New York market was concerned, by its senior member. The brand was inseparable from and almost synonymous with Holt & Company. Whatever value it had was due to the exer-
187 tions and reputation of the members of the firm. Its meaning as a brand for flour had been imparted to it by them. The moment its use became general it ceased to be valuable. Ryder had been a clerk, and from that position was promoted to a partnership. His retirement was an event of but little more importance than the change of a book-keeper or salesman. The firm still lived. It was the intention of the remaining partners to continue to transact the old business in the old way; that Holt & Company desiring to retain the good-will of the firm unimpaired, should have permitted Ryder to despoil them of the distinguishing brands upon which their success largely depended without a word of remonstrance
188 is hardly credible; but when to the presumptions thus arising is added the positive testimony that at the time of his withdrawal Ryder expressly released all right to the copartnership brands, followed by his equivocal denial, it is very clear that the defense based upon his title must fail. Proof and probability unite in pointing to this conclusion.

Regarding the defense of want of originality it must be said, in addition to the fact that it is not pleaded, that the evidence relied on is not free from uncertainty and doubt, but even should the finding be made that a few years before it was adopted by Holt & Company the name "La Favorita" was used at St. Louis as a brand for flour it must also be said that the use was casual and fortuitious and continued for a short period only. As a dis-
189 tinguishing brand for flour at St. Louis it was soon abandoned and forgotten.

There is no merit in the proposition that the complainants' trademark cannot be sustained for the reason that the flour is not manufactured by them. The proof is uncontradicted that selection and classification requires skill, judgment, and expert knowledge and adds value and reputation to the flour when made by those in whom purchasers have confidence. The case of Godillot *vs.* Harris, 81 N. Y., 267, seems conclusive upon this point.

Upon the question of laches, however, I am constrained to say that the complainants' conduct has been such that the relief granted must be limited to an injunction. Ryder commenced using
190 the brand in 1869 and has used it continuously since; that the complainants knew of this certainly as early as 1871 is not disputed; that they protested at all is denied. Certainly there was no vigor or courage shown by them until just prior to the commencement of this suit, in 1882; that they did not consent is true, but it is equally true that for men who believed their rights invaded their course was inconsistent and misleading. Ryder might well have imagined that they did not intend to call him to an account. The circumstances were such as to justify the belief on his part that he was licensed by silence to use the trade-mark. It would be inequitable to compel him to pay for its use during the long years that the complainants slept upon their rights.

191 In endeavoring to reach a just result the court should not overlook the fact that the delay in commencing the suit was unreasonable and that some of the evils of which the complainants complain are attributable to their own laches in this regard. The facts seem to bring the case within the doctrine of McLean *vs.* Fleming, 96 U. S., 245. There should be a decree in favor of the complainants for an injunction with costs.

Endorsed: United States circuit court, southern district of New York. Robert S. Holt *et al. vs.* Jose Menendez *et al.* Decision. U. S. circuit court. Filed Mar. 13th, 1885. Timothy Griffith, clerk.

192 United States Circuit Court, Southern District of New York.
In Equity.

ROBERT S. HOLT, LEONARD J. BUSBY, & CHARLES W. MCCUTCHEN

vs.

JOSE MENENDEZ & JOAQUIN MENENDEZ.

This cause having come on to be heard upon the bill of complaint herein, the answer thereto of the defendants, Jose Menendez and Joaquin Menendez, the replication of the complainants to such answer, and the proof, oral, documentary, and written, taken and filed in said cause, and having been argued by counsel for the respective parties:

193 Now, therefore, on consideration thereof, it is ordered, adjudged, and decreed, and the court doth hereby order, adjudge, and decree, as follows, viz:

1. That the complainants are entitled to the exclusive use of the words "La Favorita" as a brand or trade-mark for flour.

2. That the defendants have infringed the rights of the complainants by the use of the words "La Favorita" as a brand or mark for flour not prepared by the complainants.

3. That a perpetual injunction issue herein, directed to the said defendants, their agents, servants, and workmen, enjoining and restraining them and each of them forever hereafter from, in any form or manner, directly or indirectly, using the said trade-mark of the

194 complainants, namely, the words "La Favorita," or any word or words substantially similar thereto in sound or appearance, in connection with the preparation or sale of flour, and from branding, marking, applying, or attaching to barrels, bags, boxes, or other receptacles said trade-mark "La Favorita," or any word or words substantially like it in sound or appearance, and from selling or offering to sell any flour not prepared by the complainants in barrels, bags, or other receptacles bearing the words "La Favorita, or any word or words substantially the same in sound or appearance: Provided, That nothing herein shall prevent the defendants from dealing in the true and genuine "La Favorita" flour of the complainants.

4. That the complainants recover their costs herein, to be taxed, but there shall be no accounting.

ALFRED C. COXE.

195 Agreed to as to form.

JOHN HENRY HULL,
Def'ts' Att'y.

(Endorsed:) U. S. circuit court, southern district of N. Y. Robert S. Holt *et al. vs.* Jose Menendez *et al.* Final decree. S. St. J. McCutchen, compl'ts' solicitor. U. S. circuit court. Filed Mar. 19th, 1885. Timothy Griffith, clerk.

196 U. S. Circuit Court, Southern District of New York.

ROBERT S. HOLT *et al.*, Appellees,

vs.

JOSE MENENDEZ *et al.*, Appellants.

We hereby consent that the foregoing papers shall constitute the record to be sent by the clerk of the circuit court of the United States for the southern district of New York to the U. S. Supreme Court on the appeal to said Supreme Court in the above-entitled cause, and that the exhibits be retained by the clerk of the circuit court until the hearing of said appeal in the U. S. Supreme Court.

New York, August 11th, 1885.

A. V. BRIESEN,
For Appellants.
S. ST. J. McCUTCHEN,
For Respondents.

197 Endorsed: U. S. circuit court. Filed August 18th, 1885. Timothy Griffith, clerk.

198 Supreme Court of the United States.

ROBERT S. HOLT *et al.*, Appellees,

vs.

JOSE MENENDEZ *et al.*, Appellants.

To the honorable the Supreme Court of the United States:

The appeal of Jose Menendez and Joaquin Menendez, the above-named defendants and appellants, respectfully showeth—

That upon the 17th day of July, 1882, the above-named complainants filed their bill in the circuit court of the United States for the southern district of New York against the above-named defendants, alleging that these defendants and appellants did wrongfully infringe upon the exclusive rights of said complainants under
199 and to a certain trade-mark, consisting of the words "La Favorita," and used by them on flour, the said bill setting

forth the due registration of said trade-mark on the 28th day of February, 1882, and charging these defendants and appellants with wrongfully buying, offering, and selling flour of like character and appearance as that sold by said complainants and in imitation thereof and marking the same with said alleged trade-mark "La Favorita;" the said bill further praying that the said defendants and appellants be enjoined and restrained from the use of said alleged trade-mark and from otherwise selling or offering to sell any flour in imitation of complainants' goods, and be compelled to account for and pay to complainants
200 all profits made by said defendants by the use of said alleged trade-mark or the sale of goods to which such trade-mark might have been attached, and also to account for and pay to said complainants all damages suffered by them by virtue of said alleged wrongful acts of said defendants and appellants, averring said damages to be the sum of $10,000. To which bill the defendants and appellants made answer, filed September 1st, 1882, denying that the complainants were the owners of said trade-mark "La Favorita," and denying the registration of said trade-mark, and denying that said defendants had ever wrongfully used said alleged trade-mark or wrongfully bought, offered, or sold any flour bearing said
201 alleged trade-mark or sold any goods in imitation of complainants' goods, and averring that one Stepen O. Ryder was one of the originators of said alleged trade-mark "La Favorita" and had continuously used the same as his individual trade-mark and was the owner of and entitled to use the same; that all the flour bought, offered, and sold by said defendants and appellants and marked with the name "La Favorita" was the production of Stephen O. Ryder, and that many other dealers had for many years, to the knowledge of said complainants, used the said name of "La Favorita" as a brand for flour without objection by them; and the complainants filed their replication to the said answer on the 29th day of September, 1882, and thereafter both parties took proofs
202 in this suit, and the same was brought on for final hearing before the said circuit court in the February term of the year 1885 upon the pleadings and proofs therein; whereupon the said court on such hearing decided that the said words "La Favorita" were the trade-mark of said complainants and used by them on flour, and that the defendants and appellants had infringed upon the exclusive rights of the complainants under the same, but that said complainants were not entitled to any damages on the profits derived by said defendants and appellants therefrom and ordered that a decree be rendered accordingly and an injunction issue restraining said defendants from the further use of the said trade-mark "La Favorita."

203 That thereupon an injunction was made in this cause as ordered and is now still in effect, and that on the 19th day of March, 1885, a final decree was made and pronounced in the cause, wherein it was, in substance, adjudged and decreed that these defendants and appellants be forever enjoined from the use of said trade-mark "La Favorita," and that they pay the complainants' costs, the

same to be taxed; that on the 3d day of April, 1885, said costs were duly taxed at the sum of $303.56 and judgment was entered for that sum.

Wherefore these appellants appeal from so much of said decree of said circuit court of the United States as adjudges said complainants to be the owners of said trade-mark "La Favorita" and ad-
204 judges these appellants infringers thereof, and respectfully prays that the decree of the said circuit court and the bill, answer, pleadings, depositions, evidence, and proceedings in the said cause may be sent to the Supreme Court of the United States without delay, and that the said Supreme Court may proceed to hear the cause anew, and that so much of the said decreee of the circuit court as adjudges said trade-mark "La Favorita" to be the property of said complainants and these appellants infringers thereof may be reversed and a decree made dismissing the whole of said bill with costs with such other decree as to the Supreme Court shall seem just.

Dated New York, 11th April, 1885.

ARTHUR V. BRIESEN,
Attorney for Appellants.

The foregoing appeal is hereby allowed.
Dated April 11, 1885.

WM. J. WALLACE.

205 Endorsed: Supreme Court of the United States. Robert S. Holt *et al.*, appellees, *vs.* Jose Menendez *et al.*, appellants. Appeal. Briesen & Steele, counsel for appellants, 229 Broadway, New York. U. S. circuit court. Filed April 11th, 1885. Timothy Griffith, clerk.

206 *Bond for Damages and Costs.*

Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

ROBERT S. HOLT, LEONARD J. BUSBY, and CHARLES W. MCCUTCHEN, Appellees,

vs.

JOSE MENENDEZ and JOAQUIN MENENDEZ, Appellants.

Know all men by these presents that we, George H. Palmer, of the city, county, and State of New York, and John C. Palmer, of the town of Summit, State of New Jersey, are held and firmly bound unto the above-named Robert S. Holt, Leonard J. Busby, and Charles W. McCutchen in the sum of six hundred dollars, to be paid to the said appellees; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 10th day of April, in the year of our Lord one thousand eight hundred and eighty-five.

Whereas the above-named Jose Menendez & Joaquin Menendez have taken an appeal to the Supreme Court of tho United States to reverse the decree rendered in the above-entitled suit by the judge of the circuit court of the United States for the southern district of New York:

Now, therefore, the condition of this obligation is such that if the above-named appellants shall prosecute their said appeal to effect and answer all damages and costs if they fail to make good their plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

GEO. H. PALMER. [L. S.]
JNO. C. PALMER. [L. S.]

Sealed and delivered and taken and acknowledged this 10th day of Ap'l, 1885, before me—

[L. S.] TIMOTHY GRIFFITH,
Clerk U. S. Circuit Court, Southern Dist. of New York.

207 [Endorsed:] Vol. —, page —. U. S. circuit court. Robert S. Holt *et al.*, appellees, *vs.* Jose Menendez *et al.*, appellant-. Bond for costs on appeal. —— ——, proctor. After oral examination I deem the sureties on within bond sufficient. Timothy Griffith, cl'k. Wm. J. Wallace. U. S. circuit court. Filed Ap'l 11, 1885. Timothy Griffith, cl'k.

UNITED STATES OF AMERICA, *Southern District of New York,* } *ss:*

Geo. H. Palmer and Jno. C. Palmer, each for himself, being duly sworn, deposes and says that he is worth the sum of twelve hundred dollars over and above all his just debts and liabilities.

GEO. H. PALMER.
JNO. C. PALMER.

Sworn to this tenth day of Ap'l, A. D. 1885, before me—

[L. S.] TIMOTHY GRIFFITH,
Clerk U. S. Circuit Court, Southern Dist. of New York.

208 By the Honorable William J. Wallace, one of the judges of the circuit court of the United States for the southern district of New York.

To Robert S. Holt, Leonard J. Busby, and Charles W. McCutchen:

Whereas José Menendez and Joaquin Menendez have lately appealed to the Supreme Court of the United States from a decree lately rendered in the circuit court of the United States for the southern district of New York, made in favor of you, the said Robert S. Holt, Leonard J. Busby, and Charles W. McCutchen, and have filed the security required by law, you are, therefore, hereby cited to appear before the said Supreme Court, at the city of Washington,

on the second Monday of October, 1885, to do and receive
209 what may appertain to justice to be done in the premises.

Given under my hand, at the city of New York, in the southern district of New York, in the second circuit, the 11th day of April, in the year of our Lord one thousand eight hundred and eighty-five.

WM. J. WALLACE.

(Endorsed:) Supreme Court of the United States. Jose Menendez *et al.*, appellants, *vs.* Robert S. Holt *et al.*, appellees. Citation. Briesen & Steele, counsel for appellants, 229 Broadway, New York. Service of the within citation is hereby admitted this 13th day of April, 1885. S. St. J. McCutchen, att'y for appellees.

210 UNITED STATES OF AMERICA, } *ss:*
Southern District of New York, }

I, Timothy Griffith, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, do hereby certify that the foregoing pages, numbered from one to two hundred and nine, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of Robert S. Holt, Leonard J. Busby, and Charles W. McCutchen, complainants & appellees, against Jose Menendez and Joaquin Menendez, defendants & appellants, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 18th day of August, in the year of our Lord one thousand eight hundred and eighty-five, and of the Independence of the said United States the one hundredth and tenth.

[Seal of U. S. Circuit Court, South. Dist. New York.]

TIMOTHY GRIFFITH, *Clerk.*

Endorsed on cover: S. New York C. C. U. S. No. 342. Jose Menendez and Joaquin Menendez, appellants, *vs.* Robert S. Holt, Leonard J. Busby, and Charles W. McCutchen. Filed October 7, 1885.